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Supreme Court of the United States

[redacted]

[redacted]

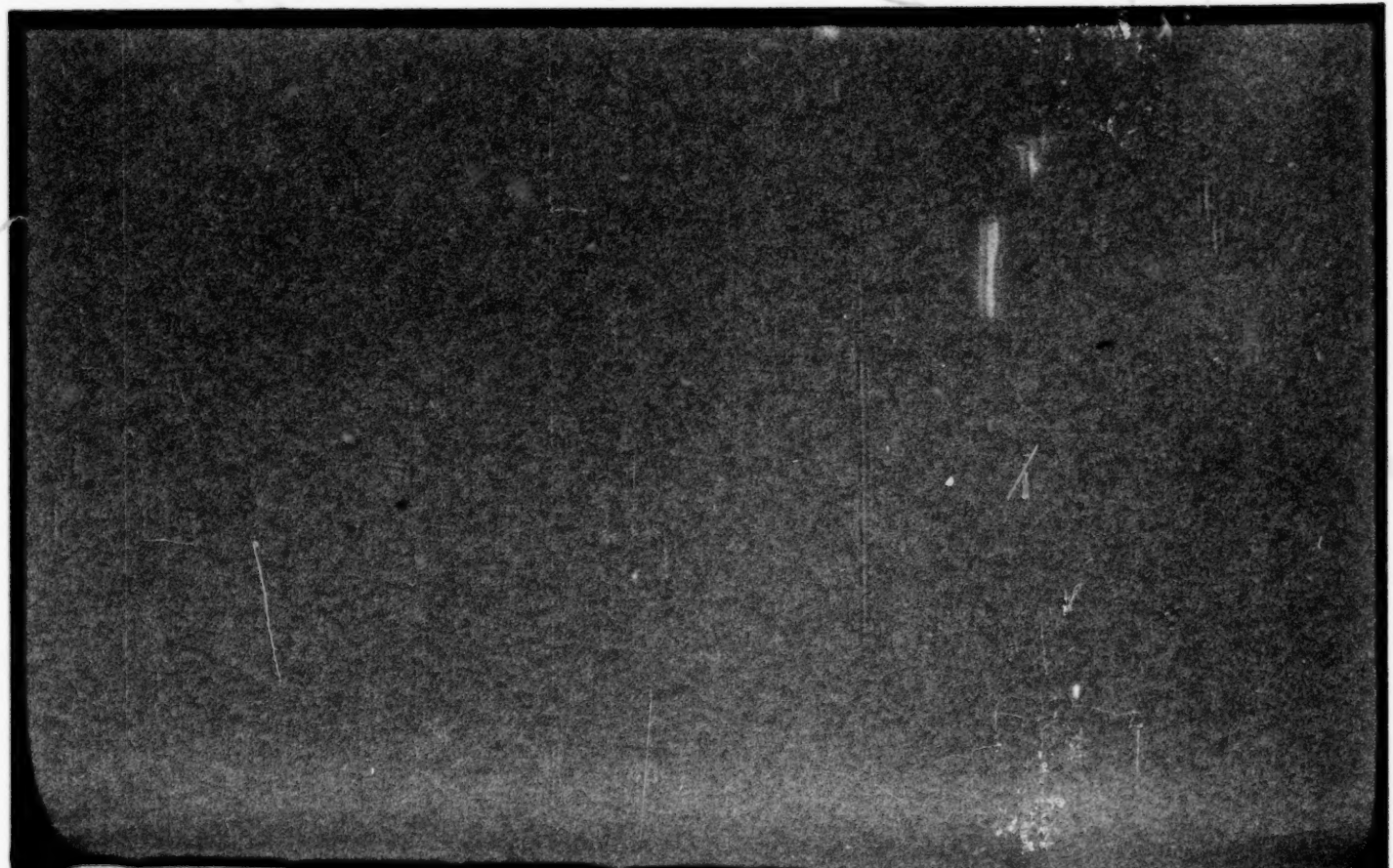
WOLF, MORGAN AND [redacted] RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS

[redacted]

[redacted]



( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No.

GULF, MOBILE AND NORTHERN RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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[fols. a & 1] [Captions omitted]

[fol. 2] **IN CIRCUIT COURT OF THE FIRST DISTRICT OF JONES COUNTY, MISSISSIPPI**

W. F. Wells

vs.

Gulf, Mobile & Northern Railroad Company, a Corporation

Declaration—Filed December 1, 1924

Comes W. F. Wells by his attorneys and files this his suit for damages against the Gulf, Mobile & Northern Railroad Company, a corporation, organized under the laws of the State of Mississippi, and owning and operating a line of railroad from Mobile in the State of Alabama through the State of Mississippi, in and through the First District of Jones County, Mississippi, and into the State of Tennessee, and is engaged as a common carrier of freight and passengers on said line of railroad, and for his cause of complaint against said defendant shows the court the following facts to wit:

That plaintiff on and before the second day of June 1924, was employed by the said railroad company as a brakeman on its local freight train, and the relation of master and servant existed between plaintiff and defendant, and because of such relationship, defendant as master owed plaintiff as servant certain duties, among which was to furnish him a reasonable place in which to work, and reasonably safe tools and appliances with which to work, and which duties plaintiff will show that defendant breached toward him and caused his injury, and damage as will be more fully set out hereinafter.

Plaintiff avers that on the second day of June 1924, that he was engaged, as aforesaid, as brakeman on defendant's freight train, and was doing and performing his duties as such brakeman on the line of railroad of said defendant, and in the town of Stratton, Mississippi, that the duties of the brakeman required that the brakeman shall jump off and

on trains and cars while in motion, in order that they may perform their duties without delay; and the duty of the railroad owed to all such brakemen, is that they shall give [fol. 3] them a reasonably safe place in which to work, and that the yard and place of work, where it is necessary for the brakeman to run from one place to another, and to jump on and off the train, shall be free from all obstacles such as brick, coal, holes, chunks, and things that will cause the brakeman to stumble and fall while in the performance of his duties, and defendant violated this duty toward this plaintiff which caused him to risk great hazards, and dangers and to be damaged.

That on the date above mentioned, plaintiff was in and about the performance of his duties, and was braking on the said train of the said defendant one-hundred or two-hundred feet below the depot at Stratton, Mississippi, an incorporated town in the State of Mississippi, and in the corporate limits of said City; that defendant had left on and near the track, where it was necessary for plaintiff to work, a large lump of coal; and while plaintiff was performing his duties as brakeman it became necessary for him to catch said train as it was moving from the said depot, and running at a rate of speed of about 15 miles per hour; and while undertaking to catch such train, as it was his duty to do so, he stepped upon this lump of coal just as he took hold the hand iron on the train, and the lump of coal caused him to stumble turning his foot to one side; caused him to fall from said train and greatly injured him, spraining his ankle and by breaking the cap of his left knee, and severely cutting and bruising his left leg and knee, and severely injuring his right leg and cutting and lacerating his body in many places, on account of which he has been unable to work since; and suffered a great deal of physical pain and mental anguish, and has been seriously and permanently injured.

Plaintiff further alleges that he is a young man 26 years old, has a wife and two children, has no other means of supporting them except by physical labor, and at the time he was injured he was making $4.88 per day. He has lost a [fol. 4] great deal of time and spent a great deal of money for doctors' bills and medicine, and been put to other expense on account of said injury, and still unable to work

regularly and earn the amount of money he was able to earn before his injury; and he has been greatly damaged on account of said injury, and on account of said negligence of said defendant, for all of which he sues defendant for $10,000.00 in this court, for the failure of said defendant to furnish him a reasonably safe place in which to work.

Collins and Collins, Attorneys for Plaintiffs.

Second Count

And for his second count to said declaration, plaintiff adopts all of that part of the first count down to and including paragraph five and says:

That plaintiff, while engaged as a brakeman for said defendant on the said train, and while doing and performing the duties of said brakeman in the town of Stratton, an incorporated town in the State of Mississippi, about one-hundred or two-hundred feet of the depot at Stratton, on the line of the Gulf, Mobile & Northern Railroad Company, the plaintiff undertook to get on the said freight train at a time when the train was moving, as it was his duty to do, and as he caught hold of the hand iron on the said train and started to get on said train he stumbled on a piece of coal which was negligently left on the yard; and just at the time he stumbled the engineer on said train gave a very sudden and very unnecessary jerk of said train, and carelessly and negligently jerked him from said train and caused him to fall on the ground, causing him to suffer very serious and permanent injury, which is more fully set out herein.

Plaintiff says that because of the aforesaid negligence of the said engineer, he suffered a serious and sprained ankle, and broke his left knee cap, cut and sprained his left leg and knee, and cut and injured and sprained his right leg and knee, and cut and lacerated his body in many places, [fol. 5] causing him to suffer great physical pain and mental anguish, and to be further seriously and permanently injured.

Plaintiff alleges that he is a young man 26 years old, has a wife and two children, has no other means for supporting them except by this personal labor, and at the time he was injured he was making $4.88 per day, and he has lost

a great deal of time and is still unable to work regularly, and to earn the amount of money as aforesaid; and has spent a great deal of money for doctors' bills and medicine bills, and other expenses, for all of which he has been very greatly injured and permanently damaged in the sum of $10,000.00, for which he sues said defendant and asks for judgment in said amount and all cost.

Collins and Collins, Attorneys for Plaintiff.

Third Count

And for his third count to said declaration, plaintiff adopts all of that part of the first count down to and including the fifth paragraph and says:

That on the second day of June 1924, while he was doing and performing his duties as said brakeman on defendant's said train, and while within the corporate limits of the town of Stratton, Mississippi, an incorporated town in the State of Mississippi, that the defendant negligently and carelessly ran its train at a rate of speed of more than 6 miles per hour in the corporate limits of said town; and while running it a greater rate of speed than six miles an hour, and while plaintiff was undertaking to catch said train, as it was his duty to do, he stepped upon this lump coal just as he took hold of the hand iron on the train, and was injured because of the negligent running of said train at a greater rate of speed than 6 miles per hour in the corporate limits of the town of Stratton; and was greatly and permanently injured [fol. 6] as follows:

His left ankle was seriously sprained, his left knee cap broken and bruised, and his left leg cut and lacerated, and his right knee and right leg was seriously cut and injured, and his body in many places was bruised, skinned and cut, causing him to suffer very great and serious physical pain and mental anguish, and has been seriously and permanently injured.

Plaintiff alleges that he is a young man 26 years old, has a wife and two children, and has no other means of supporting them except by personal labor, and at the time he was injured he was making $4.88 per day. He has lost a great deal of time, and spent a great deal of money for doctor bill and medicine bill, and been put to other ex-

penses on account of said injury, and still unable to work, and has been seriously and permanently damaged in the sum of $10,000.00 because of said injury, for all of which damage he brings this suit against the defendant for $10,000.00 and all costs.

Collins and Collins, Attorney- for Defendant.

[File endorsement omitted.]

[fol. 7] Summons and sheriff's return, filed December 3, 1924, omitted in printing.

[fol. 8] In Circuit Court of Jones County

[Title omitted]

Motion for Security for Costs—Filed February 16, 1925

Comes the defendant and moves the court to require plaintiff to give security for costs.

Ellis B. Cooper, Attorney.

Before me acting clerk of the court aforesaid, personally appeared Ellis B. Cooper, who, being by me duly sworn, deposes and says that he is attorney for the G. M. & N. R. R. Co., defendant in the above cause; that the aforesaid motion is not made for delay but in order that justice may be served; that he believes that the plaintiff, if judgment be rendered against him, cannot be made to pay the costs of this court; that he has no property out of which the judgment of this court for costs could be satisfied; that defendant has, as he believes, a meritorious defense to the suit.

Ellis B. Cooper.

Sworn to and subscribed before me this the 16th day of February 1925. A. S. Jackson, Clerk, by Esther Carter, D. C.

[File endorsement omitted.]

[fol. 9] IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

PLEA OF DEFENDANT—Filed February 16, 1925

Comes the defendant and for plea in this behalf says that it is not guilty of the wrongs and injuries of which complaint is made in the declaration exhibted against it. And of this it puts itself upon the country.

Ellis B. Cooper, Attorney.

Notice is hereby given that upon the trial of this cause the defendant will offer evidence to show that at the time of the injury aforesaid of which the plaintiff complains that the plaintiff was employed by defendant, a common carrier by railroad of freight and passengers, on one of its trains and that at the time of the alleged injury the said train on which the plaintiff was working was then engaged in the transportation of freight in interstate commerce, that is to say in commerce between the states of the United States; and that his cause of action, if any he have, is governed by the Federal Employers Liability Act.

Ellis B. Cooper.

[File endorsement omitted.]

[fol. 10] IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

PLEA OF DEFENDANT—Filed February 18, 1925

The defendant for further plea to the third count in this behalf says that even if the speed of the train was in excess of six miles per hour that this was a fact known to the plaintiff and the danger of boarding the train was apparent to plaintiff and known and appreciated by him. And plaintiff, therefore, assumed the risk of injury due to the alleged excessive speed, and of this defendant is ready to verify.

Ellis B. Cooper, Attorney.

[File endorsement omitted.]

IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

PLEA OF DEFENDANT—Filed February 16, 1925

For further plea in this behalf defendant says that the plaintiff ought not to recover herein for that on June 18th, 1924, the plaintiff signed and delivered a certain instrument in writing, a copy of which is attached hereto as Exhibit "A" to this plea and made a part hereof, whereby the plaintiff in consideration of One Dollar and other valuable consideration released and discharged the defendant from any and every claim, liability, action or demand against defendant for damages directly or indirectly occasioned by reason, or resulting from, any and all injuries sustained by plaintiff previous to and on the Second day of June, 1924. And [fol. 11] therein for the considerations aforesaid he, the plaintiff, agreed not to prosecute any suit, or permit same to be done, against defendant for the injury mentioned. Defendant avers that the injury of the plaintiff, if any, was sustained on June the 2nd, 1924, and plaintiff has, therefore, acknowledged and received satisfaction therefor. And this defendant is ready to verify.

Ellis B. Cooper, Attorney.

[File endorsement omitted.]

EXHIBIT "A" TO PLEA OF NOT GUILTY

Form 45-1000-5-23 Gill P. Co.

Gulf, Mobile and Northern Railroad Company, to W. F. Wells, Dr.

Occupation: Br*ea*kman.
Address: Laurel, Miss.

For and in consideration of One Dollar ($1.00) and other valuable considerations paid by the Gulf, Mobile and Northern Railroad Company, to me, I hereby release and forever discharge said Railroad from any and every claim, liability, action or demand against it for damages directly or in-

directly occasioned by reason of, or resulting from, any and all injuries sustained by me previous to and on the 2nd day of June A. D., 1924, within the right of way of said Railroad and upon any line or Railroad operated by it. And I further agree, in consideration of the foregoing, not to [fol. 12] institute suit or prosecute any suit or suits or permit the same to be done, against said Railroad for damages arising from any such injuries.

I have read the foregoing and fully understand the same.

Dated at Laurel, Miss., this the 18th day of June 1924.

W. F. Wells. (Seal.)

Witness to signature: W. R. Hargrove.
Paid at Laurel, Miss., 6/18/24. B. D. Casey, Agent.
Correct: W. R. Hargrove.
Approve for payment. H. Gross, Supt.
Distribution: Division, Mobile; Account No. 420F; Amount, $1.00.

Note.—Agents will pay this release when properly approved for payment and signed by the party in whose favor same is issued and forward to Accounting Dept. for credit attached to monthly Balance Sheet, noting opposite entry Cr. account *or* persona- injury release.

In Circuit Court of Jones County

[Title omitted]

Order Transferring Cause to Circuit Court of the Second Judicial District of Jones County—Filed February 24, 1925

By consent of the patries in open court this case is transferred to the Circuit Court of the Second Judicial District of Jones County for trial and such orders and judgment as might have been made in this court can there be made.

W. J. Cranford, Judge.

[File endorsement omitted.]

[fol. 13] IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

REPLY—Filed April 18, 1925

Now comes the plaintiff by his attorneys and for his replication to defendants special plea filed herein against him denies that he executed a release as set out by defendant. He says that after he was injured by said defendant, as set out in his said declaration, that defendant by its agents in Laurel wrote him a letter asking him to come to see them; that he did go to see them; that the said agents of said defendants promised to pay him full time upon his execution of a release; that he affixed his signature to said release but did not deliver the said release, because defendant did not pay him as agreed, but procured the release by fraud and trickery; that the said release was never by consent of plaintiff in the hands of defendant as a full settlement because said defendant was to pay said money when the said release was signed, and this defendant failed to do. All this plaintiff is ready to verify.

Jeff Collins, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 14] IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

ORDER GRANTING LEAVE TO FILE REJOINDERS—Filed April 13, 1925

Upon motion of defendants, defendant is hereby granted leave to file two or more rejoinders to the replication of plaintiff to the special plea of defendant as to the release executed by plaintiff.

[File endorsement omitted.]

IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

REJOINDERS—Filed April 13, 1925

Defendant for rejoinder to the plaintiff's replication to defendant's special plea avers that it did not obtain the release through fraud or trickery as alleged in the replication. And of this defendant puts itself upon the country.

Ellis B. Cooper, Attorney.

[fol. 15] Defendant for a second rejoinder, filed by special leave of court first had and obtained, avers that long after he, the plaintiff, knew that he would not be paid full time the plaintiff remained in defendant's employ and retained the fruits of his contract of release. Defendant avers that by plaintiff's conduct in retaining employment and the other consideration of the contract, he, the plaintiff, has ratified and approved the alleged breach of promise to pay for time lost. And this defendant is ready to verify.

Ellis B. Cooper, Attorney.

[File endorsement omitted.]

[fol. 16] IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

PLAINTIFF'S REQUESTED INSTRUCTIONS GIVEN TO JURY—Filed April 14, 1925

If you believe from the evidence in this case that plaintiff when attempting to board defendant's train at Stratton, Mississippi, stepped on a lump of coal just as he caught the grab iron on said train and his foot turned and at the same time there was a sudden or unusual lurch of said train which lurch, if any, proximately caused his injury, then you must find for the plaintiff.

Given.

You are further instructed for the plaintiff, that if you believe from a preponderance of the testimony in this case that the defendant's train at the time of plaintiff's injury

was negligently handled by a sudden and unnecessary jerk, which proximately caused plaintiff's injury, then you must find for the plaintiff.

Given.

[fol. 17] You are further instructed for the plaintiff that the burden of proof is on the defendant to prove that it had or procured a valid release from the plaintiff, releasing it from liability for the said injury to plaintiff, if any, and if you believe from the evidence in this case that defendant procured the signature and delivery of said release leading plaintiff to believe that before said release was to become binding, that he was to receive his pay for lost time, then you must disregard said release.

Given.

You are further instructed for the plaintiff that if you find for the plaintiff the form of your verdict may be: "We, the jury find for the plaintiff and assess his damages at $—," which you believe from a preponderance of the testimony he had suffered because of said injury, not to exceed the amount sued for.

Given.

[fol. 18] You are further instructed for the plaintiff, that if nine jurors agree on a verdict you may return that as the verdict of the jury.

Given.

[File endorsement omitted.]

In Circuit Court of Jones County

[Title omitted]

Defendant's Requested Instructions Given to Jury—Filed April 14, 1925

The court instructs the jury for the defendant that the presence of the coal on which the plaintiff stepped was not negligence and you cannot under the evidence find against the defendant solely because of the coal being at or near the track.

Given.

[File endorsement omitted.]

The court instructs the jury that it is your sowrn duty to find for the defendant unless you believe from a preponderance of the evidence that the engineer in the operation of the train negligently did something to cause an unusual lurch.

Given.

[fol. 19] The court instructs the jury that if you believe from the evidence that the accident resulting in the injury of the plaintiff would not have occurred but for the piece of the coal on the track, it is your sworn duty to find for the defendant.

Given.

The court instructs the jury for the defendant that if you believe from the evidence that the engine crew did nothing to cause any lurch or jerk of the train, it is your sworn duty to find for the defendant.

Given.

The court instructs the jury that you, even though you may believe from the evidence that the train was going at an unlawful rate of speed, may not find against the defendant on the ground that such speed is negligence.

Given.

[fol. 20] The court instructs the jury for the defendant that if you believe that stepping on the coal by the plaintiff was the sole, proximate cause of the injury, it is your sworn duty to find for the defendant.

Given.

The court instructs the jury that if you believe from the evidence that the slack ran in or out and caused the unusual lurch or jerk, if you should believe from the evidence that such occurred, it is your sworn duty to find for the defendant, provided you shall further believe fro mthe evidence that said lurch, if any, was not caused by any act of negligence.

Given.

The court instructs the jury for the defendant that if you believe from the evidence that the crew of the train did not know that the plaintiff was not aboard the train, and was guilty of no negligence in not knowing, it is your

sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train.

Given.

[fol. 21] The court instructs the jury for the defendant that if you believe from the evidence that the lurch, if any, was caused by the slack running in or out and not by any act of negligence, if any, done by the engineer, it is your sworn duty to find for the defendant.

Given.

The court instructs the jury that if the plaintiff signed and delivered the release without any promise as to payment for time lost, it is your sworn duty to find for the defendants.

Given.

[File endorsement omitted.]

[fol. 22] In Circuit Court of Jones County

[Title omitted]

Plaintiff's Requested Instructions to Jury, Refused—Filed April 14, 1925

The court instructs the jury for the plaintiff that the defendant owed plaintiff certain duties among which was to furnish him a reasonably safe place in which to work; and this duty of the defendant to furnish plaintiff a reasonably safe place is a continuing duty. It is not satisfied by putting the place in a reasonable safe condition once, then allowing it to become dangerous while the servant is at work, but it must be reasonably safe at all times and if you believe from the evidence in this case that defendant negligently failed to perform his duty toward plaintiff and thereby caused plaintiff's injury, then it is your sworn duty to find for the plaintiff.

Refused.

[File endorsement omitted.]

In Circuit Court of Jones County

[Title omitted]

Defendant's Requested Instructions to Jury Refused—Filed April 14, 1925

The court instructs the jury to find for the defendant.
Refused.

The court instructs the jury that event hough you may believe from the evidence that there was an unusual lurch, still if said lurch was occasioned by the slack between cars running in or out, it is your sworn duty to find for defendant.
Refused.

[fol. 23] The court instructs the jury for the defendant that even though you may believe from the evidence that the witness Hargrove promised plaintiff that he would pay him for the time he had lost or would lose and did not, it is your sworn duty under the law and your oaths to find for the defendant.
Refused.

The court instructs the jury for the defendant that if you believe from the evidence that the crew of the engine did not know that the plaintiff was not aboard the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train.
Refused.

[File endorsement omitted.]

In Circuit Court of Jones County

Verdict—Filed April 14, 1925

"We, the jury find for the plaintiff and assess his damages at $2,000.00."

[File endorsement omitted.]

[fol. 24] IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

JUDGMENT—Filed April 15, 1925

This cause this day came on to be heard and all parties appearing announced ready for trial; whereupon there came a jury of good and lawful men, composed of J. W. Bush and eleven others, who being sworn to try the issue joined, having heard the testimony and having been instructed by the court, retired to their room to consider of their verdict and presently returned into open court and announced the following verdict:

"We, the jury find for the plaintiff and assess his damages at Two Thousand Dollars ($2,000.00)."

It is, therefore, ordered and adjudged that plaintiff, W. F. Wells, do have of and recover from the defendants, Gulf, Mobile and Northern Railroad Company, a corporation, the sum of Two Thousand Dollars ($2,000.00) and all costs. For all of which let execution issue.

[File endorsement omitted.]

[fol. 25] IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

MOTION FOR A NEW TRIAL—Filed April 15, 1925

Comes the defendant, Gulf, Mobile and Northern Railroad Company, a corporation, defendant in the above styled cause, and moves the court to vacate the judgment rendered against the defendant and in favor of the plaintiff at a former day of this term of the court and grant the defendant a new trial. For ground of said motion the defendant assigns the following reasons:

(1) The court erred in not excluding the testimony of the plaintiff and directing a verdict in favor of the defendant.

(2) The court erred in not admitting testimony offered by defendant to show the extent of the injury of the plaintiff and for which he sued.

(3) The court erred in the trial of this cause in refusing to admit as evidence the testimony of the witnesses, Dr. J. B. Jarvis, Dr. W. N. Blount and Dr. C. H. Ramsay, as will appear by reference to the stenographer's notes.

(4) The court erred in refusing to permit the introduction in evidence of ex-ray photographs showing the alleged injury of the plaintiff.

(5) The court erred in refusing to admit in evidence all testimony offered by the defendant and to which objection was made by the plaintiff, as shown by the stenographer's notes.

[fol. 26] (6) The court erred in admitting testimony of the plaintiff over objection of the defendant, as will appear by reference to the stenographer's notes.

(7) The court erred in giving to the plaintiff each and every instruction given to the plaintiff, as will appear by reference to said instruction on file with the papers in the case.

(8) The court erred in refusing to the defendant certain instructions asked by the defendant, as will more fully appear by reference to said instructions, on file with the papers in this cause.

(9) The verdict of the jury was excessive.

(10) The verdict of the jury was contrary to the law and the evidence.

(11) The verdict of the jury shows bias and prejudice on the part of the jury against the defendant.

(12) For other causes to be shown on the hearing hereof.

Ellis B. Cooper, W. S. Welch, Attorney for Defendants.

[File endorsement omitted.]

[fol. 27] IN CIRCUIT COURT OF JONES COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed April 16, 1925

This cause coming on for hearing this day, on the motion of the defendant to vacate the judgment entered against the defendant and in favor of the plaintiff at a former day of this term of the court and grant the defendant a new trial, and the court being fully advised in the premises and having considered said motion, doth overrule the same. To the action of the court in overruling the said motion, the defendant then and there excepted in open court and still excepts.

[File endorsement omitted.]

[fol. 28] IN CIRCUIT COURT OF JONES COUNTY

NOTICE TO FILE TRANSCRIPT OF TESTIMONY—Filed April 18, 1925

Laurel, Miss., 4/17/25.

Mrs. Jennie F. Smith, Court Stenographer, Hattiesburg, Mississippi.

DEAR MADAME: Notice is hereby given you to transcribe the notes of the testimony taken by you on the trial of the case of W. F. Wells vs. Gulf, Mobile and Northern Railroad Company, said case having been tried at the March term, 1925, of the Circuit Court for the Second Judicial District of Jones County, Mississippi, and the said term having been finally adjourned on April 16, 1925.

This notice is given you in order that the defendant may perfect its appeal to the Supreme Court of Mississippi from the judgment rendered in said case against it. After the transcription of said notes please file with the Clerk of the aforesaid court as the law prescribes.

Yours very truly, Ellis B. Cooper, Attorney for G., M. & N. R. R. Co.

I do hereby certify that one day after the final adjournment of the term of court during which the above cause was tried and during which the judgment apealed from was rendered I mailed a true copy of the foregoing notice to the addressee at Hattiesburg, Mississippi, same being her post-office address.

This being the seventeenth day of April, 1925.

Ellis B. Cooper.

[File endorsement omitted.]

[fol. 29] Stenographer's certificate to statement of evidence omitted in printing.

[fol. 30] In Circuit Court of Jones County

Statement of Evidence

W. F. Wells, plaintiff, having been first duly sworn, testified as follows:

By Mr. Jeff Collins:

Q. You are W. F. Wells?
A. Yes.
Q. Where do you live?
A. Laurel.
Q. Where raised?
A. Jones County.
Q. Raised north of here?
A. Northern part of the county.
Q. Near Sharon?
A. Yes.
Q. Have a family?
A. Yes—wife and three children.
Q. How old are you?
A. Twenty-eight.
Q. Have you ever been employed by the G. M. & N. R. R.?
A. Yes.
Q. In what capacity?
A. Brakeman.
Q. When employed by them?

A. In April, May—part of June and July—1924.
Q. When you went to work in what capacity did you work?
A. My job?
Q. Yes.
A. As brakeman.
Q. Worked all that time as a brakeman?
A. Yes.
Q. How much getting a day for your work?
[fol. 31] A. Part of the time we got $4.88 per day; and part of the time—got a raise to $5.24 per day—I think this raise took effect May 15th or June 1st.
Q. $5.24 was the amount earning at the time injured?
A. Yes.
Q. When injured?
A. June 2nd.
Q. Where were you at the time?
A. Stratton.
Q. You know how far that is from Laurel?
A. Laurel station is No. 111; Union is No. 181 and Stratton is five miles south of Union. About twenty six miles.
Q. In what county is Stratton?
A. Newton County.
Q. On the line of the G. M. & N.?
A. Yes.
Q. Is that an incorporated (*important*) town?
A. I don't know—I can't say.
Q. What train were you braking on at the time injured?
A. Local south—we call it.
Q. In which direction headed?
A. South.
Q. Coming to Laurel?
A. Yes.
Q. Where did you get on that train?
A. Where we started from?
Q. Yes.
A. Union.
Q. That is in what county?
A. Newton.
Q. You came on down to Stratton and there is where you were injured?
[fol. 32] A. Yes.
Q. What were you doing at the time injured?
A. Switching in the yard at Stratton.

Q. You know how many lines of track in Stratton of the G. M. & N. road?

A. Four.

Q. Four tracks?

A. Yes.

Q. Main line?

A. That includes a new spur they put in there for the planing mill switch on the left hand side on the north and a passing track on the right hand side and the back track.

Q. Was there a depot at Stratton?

A. Yes.

Q. How far from the depot when injured?

A. About 100 feet.

Q. North or south?

A. South.

Q. Were you on the main line or switch track?

A. Main line.

Q. Do you know whether or not the train had finished its switching and started out?

A. Yes—finished switching.

Q. Your job as a brakeman—what part of the train did that put you on?

A. I was on the swing—that is on the rear end.

Q. Had you been working all the morning on the back end?

A. Yes.

Q. Anyone helping you back there?

A. Yes—two other fellows.

Q. How many brakeman did they have on the train?

A. Two brakemen and one flagmen.

[fol. 33] Q. Just had two on the train?

A. Yes.

Q. And you were working on the swing?

A. Yes.

Q. Tell the jury just how you were injured?

A. We had been switching in the yard at Stratton and had a car of company material in the back track up there—I think this car was from Mobile and some cars ahead of this car and we reached back in there and got the cars and brought them down and shoved this car of material on the main line and went back on the back track and shoved them and went back—had some switching to do for the planing mill and come back—and dropped a car on the

back track and shoved it out and come back and that finished the switching; we had some merchandise work up there but finished it first as we came out this back track on to the pass—and after we got on the pass we went on the main line and the head on brakeman throwed the switch on the main line and let the train out on the main line and brought the train back and I made the coupling—after I made the coupling and cut the car in the conductor said, "You better go throw that derail and lock it."

Q. How far from the derail then from the back end of the train?

A. About forty feet when I throwed the derail on where we made the coupling was two car lengths from the caboose—and the derail was back over here on the passing track; I throwed this derail and cut straight across to get to the caboose—the train was running not over eight or ten miles per hour when I went to catch the caboose and this big lump of coal about as big as your fist was there and as I grabbed the grab iron I stepped on this piece of coal and [fol. 34] I went down and the engine gave an unusual jerk and that threw me and my knee struck on the cross ties.

Q. State whether or not jerked loose from the train?

A. I was.

Q. You fell to the ground?

A. Yes.

Q. On the cross ties?

A. Yes.

Q. Did you receive an injury?

A. Yes, I had both knees bursted and my left knee cap broken.

Q. Will you pull up your pants leg and show the jury just where you were injured?

A. Shows injury.

Q. What is that?

A. This place along here was bruised up; this knee cap was broken and this knee was bursted open.

Q. When you broke—where was it broken?

A. Square across the top of it—this way.

Q. Crosswise?

A. Yes.

Q. I see on your right knee cap a scar—how long is that?

A. About an inch and a quarter.

Q. About how wide is it?

A. About a quarter of an inch.

Q. Down here on your right leg—how many scars do you find as a result of this injury?

A. Four here.

Q. On your shin?

A. Yes.

Q. Was that all the injury you had on your right leg?

A. Yes.

Q. Was this knee cap broken?

—. ——.

[fol. 35] Q. This left knee cap there is a scar that runs acrosswise the knee—how long is that scar?

A. An inch long.

Q. About how wide?

A. Quarter inch.

Q. The left knee cap was broken in two?

A. Yes.

Q. Square across?

A. Yes.

Q. Will you let the jury feel across the knee cap?

A. Yes.

Q. Did you receive any other injury on the left leg?

A. No.

Q. You told the jury — was enlarged?

A. Yes.

Q. Is it enlarged?

A. Yes—from here to here.

Q. Larger than the right knee?

A. Yes.

Q. Did you receive any other injury?

A. No sir.

Q. State whether or not you lost any time as a result of this injury?

A. Yes—about five months and little better.

Q. And making $5.24 per day?

A. Yes.

Q. Have you lost any time since then?

A. I have not worked any since then, but after the five months was up I had other trouble I was disabled to work from.

Q. State whether or not as a result of this injury you are [fol. 36] now able to hold a job as a brakeman?

A. No.

Q. Why?

A. I can't get out and do any walking or running to amount to anything on account of my left leg.

Q. Where does it bother you?

A. In the knee joint.

Q. What effect does it have on you?

A. If I walk a lot on it it gets real stiff—can't bend it at all.

Q. State whether or not — gives you any pain?

A. Yes—both knees hurt me.

Q. Is that a result of the injury or not?

A. I think so.

Q. Did you have any trouble with your knees before that injury?

A. No.

Q. And you have since?

A. Yes.

Q. State whether or not you suffer any pain on account of this injury?

A. Yes—great deal of pain.

Q. How long did you suffer severe pain?

A. Something like a month that I suffered hard pain.

Q. What Doctor—if any—treated or dressed your wounds?

A. I don't know whether I can remember his name or not, Dr. at Decatur—What is his name Mr. Myers?

Q. You had a Doctor at Decatur?

A. Yes.

Q. When you came back to Laurel what Doctor did you have?

A. Took me to the hospital—Dr. Blount.

Q. How long did you stay in the General Hospital?

[fol. 37] A. Just one week.

Q. How long under the treatment of the Doctor?

A. About four months.

Q. You say you suffer now from the result of the injury of both knees?

A. Yes.

Object to leading.

Q. State to the jury now—whether or not you can walk without limping?

A. No I can't—not in my left knee.

Q. Do you have any other means of making a living than by physical labor?

A. No.

Q. Who was it that controlled your services or your labor when working on the train—who gave you orders?

A. Conductor.

Q. Then, at the time you were injured, you were working under the direct instructions of the conductor?

A. Yes.

Q. The conductor knew where you were?

A. Yes.

Q. Who was it controlled the train?

A. Conductor.

Q. This train—did it have any more switching to do?

A. No.

Q. Where had you started?

A. On to Decatur.

Q. At the time the conductor told you to go throw the derail—state whether or not the train was moving?

A. It was not moving when he gold me to throw the derail [fol. 38] but before I got across and throwed and got back to the train it was moving.

Q. State to the jury whether or not it was necessary to catch on a moving train?

A. I had to.

Q. And moving eight or ten miles an hour?

A. Yes.

Q. Which side of the train was that on?

A. Left hand side facing south.

Q. Which side of the train did the conductor work on?

A. On the same side.

Q. The engineer—I mean?

A. Right hand side.

Q. When he is on the right hand side who is it gives him orders on the left hand side.

A. Fireman—taking the signals.

Q. Was the fireman on the left side?

A. Yes.

Q. Was he in position to see where you were?

A. Yes.

Q. And could you see where you were?

A. Yes.

Q. They filed a plea here stating they have had a settle-

ment with you—state to the jury if the G. M. & N. R. R. Company has ever paid you anything for this injury?

A. Have not.

Q. When was it you went down to see the G. M. & N. R. R. Company or their agent with reference to this injury?

A. Sometime in June—I don't remember. I know I had gotten able to walk around a little—that is, without crutches. Sometime in June—about the 17th on 18th I went to the G. M. & N. office to get my mail, have a box in [fol. 39] the hallway for the mail—and I went down and some of the boys told me.

Objection.

Q. You went for your mail?

A. Yes—and as I passed there Mr. Hargrove——

Q. Who is he?

A. One of the office men.

Q. You know what position he filled there?

A. No—he works in the Superintendent's office.

Q. Of the G. M. & N. R. R.

A. Yes.

Q. All right——

A. And he told me he wanted to see me. I got my mail and came back to his office and he said "we have got some papers here we want to fill out" and he filled out this release and said, "here is a release that you will have to sign—it is customary that the company have this release signed.

Mr. Cooper: Object to any testimony which in any way varies or alters the terms of the release.

Overruled. Exception.

A. When I signed the release I said Mr. Hargrove I can't sign this release and accept no $1.00 in settlement the doctor told me I would be knocked out for a good while, will not be able to work. He said, "What kind of settlement are you going to expect?" I said—if you will pay me for the time lost I will sign the release. He said, "We [fol. 40] will pay you for the time lost and they will pay you for the time of all loss from now on—they will be willing to do that."

Q. What were they to pay you at that time?

A. Only $4.88 per day—I will say that and be sure.

Q. And were they to pay you for the time you had lost at the time you signed the release?

A. Yes.

Q. Did they do that?

A. No.

Q. When you signed the release and they got it—did they pay you?

A. No.

Q. That is the way they got the release?

A. Yes.

Q. When you had signed the release what did they tell you to do?

A. Go and see Mr. Walker—understood Walker was the claim agent— I went back to Mr. Hargrove and he told me I would have to go to Mobile to see Mr. Key that he didn't have anything more to do with it.

Q. Did you go to see Mr. Key?

A. Yes. This was after I went to see Mr. Key—it was two months later and I couldn't go because I was not able.

Q. Did they pay you the money then?

A. No.

Q. And then it was two months before — able to go to Mobile?

A. Yes.

Q. Did they pay you anything there?

A. Not a dollar.

We object to all this testimony.

Overruled. Exception.

[fol. 41] Cross-examination:

Q. Maybe the jury does not understand about all those tracks—what is a back track?

A. Track that is back of the passing track.

Q. That is the reason they call it a back track?

A. Yes.

Q. Passing track is for trains to pass on?

A. Yes.

Q. Passing track is a long track?

A. Yes.

Q. And the back track is a spur track of the passing track?

A. Yes.

Q. And short?

A. Yes.

Q. At Stratton there is a main line and it runs north and south?

A. Yes.

Q. The passing track is on the east or west side of the main line?

A. East side of the main line.

Q. There is a spur leading from the main line to the passing track?

A. Yes.

Q. There is a track leading from the passing track to the back track?

A. Yes.

Q. And a switch from the back track to the passing track in other words two switches on the back track?

A. No sir—only one.

Q. Two switches on the passing track?

A. Yes—north and south end.

Q. That day—who was the crew?

A. Doolittle, conductor; and Bill Keller, flagman; and [fol. 42] H. Ezell, brakeman; Alexander, engineer and the fireman was a negro.

Q. You came in there and had some work which was to be done?

A. Yes.

Q. You are what they call the swing man?

A. Yes.

Q. The flagman looked after the rear end?

A. Yes.

Q. The brakeman looked after the front end?

A. Yes.

Q. And you are supposed to look after the middle?

A. Yes.

Q. When you pulled in there that day you had how many cars?

A. About eight or nine.

Q. You said ten in the other trial—is that about right?

A. I don't remember.

Q. Something like that?

A. Not over ten at the outside.
Q. You had two cars to set out?
A. Did not have any to set out.
Q. Why did you stop there?
A. Had to pick up a car there and merchandise to work.
Q. You picked up that car you got on the east side or left hand side?
A. Yes.
Q. On which side did you ordinarily work?
A. Owing to which side the track is on.
Q. If you can work on the engineer's side you do do that?
A. Yes.
Q. In order to pass signals to him?
A. Yes.
[fol. 43] Q. You were on the left hand side?
A. Yes.
Q. This was the side the track was on?
A. Yes.
Q. Was anyone on the right hand side?
A. No.
Q. Was Ezell the brakeman?
A. Yes.
Q. You made your movement and picked up this car of material—and then you waved the engineer to move on out?
A. Yes.
Q. Who threw the switch at the passing track after you got out?
A. I threw the switch to the passing track.
Q. Then the train backed up?
A. Yes.
Q. On which side was Ezell then?
A. Left hand side.
Q. After the coupling was made on which side was Ezell?
A. Left hand side.
Q. You made the coupling—did you give any signal to indicate that everything was O. K.?
A. I told Mr. Doolittle.
Q. Who was he?
A. Conductor—he was standing there.
Q. Did you tell Ezell also?
A. No.

Q. What do you mean by O. K.?

A. When everything is all ready to go—all the couplings made.

Q. This derail track—what track is that on—the passing track?

A. No—passing track.

Q. How far from the switch?

[fol. 44] A. Which switch?

Q. Of the passing track into the main line—the nearest switch?

A. About 75 feet.

Q. That is a thing they put on there to keep a car from rolling on the main line?

A. Yes.

Q. After you said "everything was O. K. you went out and threw this derail back—you mean by that you put it in position to stop?

A. Keep them locked.

Q. The train—when you started out there—had not moved?

A. No.

Q. How far had the train moved between the time it started and the time that you tried to catch it?

A. I guess about fifty feet.

Q. In other words, the train moved about fifty feet from the time you went out at Mr. Doolittle's request and threw the derail and locked it and got over there had moved fifty feet?

A. Yes.

Q. That train had passed the spot where you were hurt?

A. Yes.

Q. And the whole train except the caboose had passed the spot where you got hurt?

A. Yes.

Q. When you got there you say you stepped on this piece of coal?

A. Yes.

Q. Who signaled the train to go ahead?

A. I did.

Q. Your business as a brakeman required that you catch [fol. 45] moving trains?

A. Yes.

Q. You have to jump them and have to get off of them don't you?

A. Yes.

Q. You knew that—and been doing it for something like five or six months?

A. Yes.

Q. You were a freight and a passenger brakeman?

A. Yes.

Q. How many trips on a passenger train?

A. I don't remember.

Q. Several?

A. Yes.

Q. And most of your work had been done on a freight train?

A. Yes.

Q. You are what is called an extra brakeman?

A. Yes.

Q. The only difference between an extra and regular brakeman is that a regular man has a regular run?

A. Yes.

Q. What does an extra do?

A. What we call—fight the extra board—first man that lays off we go on.

Q. You take the place of anyone that lays off or is sick?

A. Yes.

Q. You had made a good many runs during the five months?

A. Yes.

Q. About how many runs had you made?

A. Worked every day.

Q. This occurred on June 2nd?

A. Yes.

{fol. 46} Q. The day this release was signed was on June 18th?

A. Best of my recollection.

Q. When did you go back to work?

A. Worked one day on the 2nd day of July.

Q. You made nearly fourteen hours that day?

A. I think we did.

Q. You made that as a brakeman.

A. Yes.

Q. Worked that day as a brakeman.

A. Yes—I did not work that long, but I got paid for that

long—I left Laurel and went to Union and from Union to Meridian and they were short a man there and I had to deadhead a man out of here—I got off the passenger train onto the local and we went from there to Louisville.

Q. You worked that day as a brakeman?

A. Yes.

Q. Where did you go from Meridian—to Louisville?

A. Yes.

Q. About how long is that run?

A. About eighty-five miles.

Q. That takes something like seven or eight hours?

A. Yes.

Q. What were you that day—swing brakeman?

A. Yes.

Q. That was on July 2nd?

A. Yes.

Q. When did you work again?

A. Sometime in August.

Q. On August 9th?

A. Something like that.

[fol. 47] Q. You worked as a helper that day—what do you mean as a helper—helped Mr. Bender the engine foreman?

A. Switching in the yard.

Q. Do you call that a helper—I thought that was a switch man?

A. It is.

Q. You worked on August 9th.

A. Yes.

Q. You worked on the 13th and 14th of August?

A. Yes.

Q. And 14th?

A. I don't remember the date I worked—a few days.

Q. You worked every day from August 9th to September 7th except the 10th, 11th and 12th of August; the 17th of August 21st, and 29th of August—that right?

A. I don't remember.

Q. You did draw pay for that time?

A. Yes—I went to work on the 9th of August.

Q. In other words—from August 16th to the 31st you drew $65.39 for your work?

A. I don't remember how much my work was.

Q. That is about right?

A. Something like that.
Q. From July 1st—what is that I hand you?
A. Pay for the day I worked from Meridian to Louisville.
Q. On July 2nd.
A. Yes—$9.55.

We desire to introduce that.
Marked Exhibit "1."

[fol. 48] Q. What is this I hand you?
A. Pay from August 1, to 15th.
Q. How much is that?
A. $9.36.

We desire to introduce that.
Marked Exhibit "2."

Q. What is this I hand you?
A. From August 1-15th.
Q. How much is that?
A. $12.22.
Q. Then you made that month—from August 1st to the 15th you made $22.58?
A. Yes.
Q. And you say making about $4.44 per day?
A. Not then—$5.24.
Q. What is this I hand you?
A. For August 16-31.
Q. How much?
A. $52.49.
Q. How much is that one?
A. $12.90.
Q. Then, you made $65.39 from August 16 to the 31st, that right?
A. Yes.
Q. What is this I hand you?
A. During the month of September—$5.32.
Q. What is that date?
A. September 1st to 15th—$17.86.
Q. During that half month you made something like $18.00?
[fol. 49] A. About $23.00.
Q. On September 7th—about that time you quit did you not—resigned your job as a brakeman?

A. Yes, something like that.

Q. You were not discharged—you quit?

A. Yes.

Q. You worked then—to get it straight—you worked in July one month—and worked between August 1, and 15th and from August 15—to 31st and from September 1st, to the 15th that right?

A. Not to the 15th.

Q. What day?

A. I think on the 6th *of* 7th—I don't remember.

Q. And during August you put in almost every day after you made this trip to Mobile?

A. I think I went down there about the 6th of August and on the 5th of August made three trips—staid two days to catch Mr. Keys—and on the 9th I went to work and worked again on the 13th and 14th—and worked pretty well all the rest of the month.

Q. And up to the time you quit?

A. Yes.

Q. You went to see Mr. Keys on August 6th and 7th—that about right?

A. Yes.

Q. When you got to Keys he told you he had nothing to pay you for the loss of time?

A. Yes.

Q. That was on August 6th or 7th?

A. Yes.

Q. And on August 9th you went back to work and worked until September 7th when you quit?

[fol. 50] A. Yes.

Q. According to your contentions or your understanding Mr. Hargrove promised to pay for you the time you had lost?

A. Yes.

Q. And that was the consideration of the contract or this release?

A. Yes.

Q. You went to Mr. Hargrove—you knew it was the custom there, when a man was injured, to require them to sign this release of $1.00 before he went back to work?

A. Yes—after he had a settlement—he said didn't make

any difference how much they paid you—it was necessary for this release to be signed.

Q. You understood that was part of their rule, when a man was hurt *or* a man was taken sick that it was up to him to sign the $1.00 release before he could go back on his job?

A. Yes—after he was injured.

Q. And when you went in there you knew that—that was sixteen days after your injury?

A. Yes.

Q. And you walked over there of your own accord?

A. I went in a car with some of the boys.

Q. And you said nothing about going back to work at that time?

A. No.

Q. Mr. Hargrove promised you if you would sign that release that he would pay you the wages due?

A. Yes—he did not say he would, he said, "we will pay you."

Q. The Railroad Company?

[fol. 51] A. Yes.

Q. How much was that?

A. The wages?

Q. Yes.

A. I have not figured it up.

Q. You have not on that promise brought any suit at all, that right?

A. No sir.

Q. When he gave you this release he said for you to sign it?

A. Yes.

Q. You then signed it?

A. Yes.

Q. And you went down stairs to Mr. Cases' Office?

A. I don't remember where I went—I know I had to go down stairs to go home.

Q. Didn't you go down stairs and go to Miss Ellis and get the $1.00?

A. I don't remember.

Q. You did go to Mr. Cases' office?

A. I don't remember going to his office that day.

Q. Did you get the dollar that day?

A. I don't remember whether I ever got the dollar or not.

Q. You testified before in regard to this did you not?

A. Yes.

Q. You said on that occasion that you went down and got the dollar?

A. I don't remember my testimony. I don't remember whether I got the dollar or not.

Q. You don't remember anything about that?

A. No.

[fol. 52] Q. You say here is your answer——

Objected to that. Overruled. Exception.

Q. "He said, "if we have to give you $1,000.00 this release would have to be signed and the $1.00 paid, this is the agreement of the railroad company—sign this and I will pay you for the time lost and told me to take it to Mr. Casey's office and he would pay me the $1.00 and to come back and he would have the check ready to pay for the time lost. You remember that?

A. Yes.

Q. When you came back state whether he paid you?

A. No—he said I would have to go see Mr. Keys.

Q. Then you did go to Mr. Cassey's office?

A. I don't remember. I believe I did.

Q. You did go there?

A. Yes.

Q. And you went to the cashier and got this dollar?

A. I don't say—I had not considered the dollar to amount anything.

Q. You signed that did you not?

A. Yes.

Q. That is your signature?

A. Yes.

We want to offer this in evidence.

Marked Exhibit "8."

[fol. 53] Q. Was your knee you say was broken—was it ever put in a cast?

A. No sir.

Q. Never was put in a cast?

A. No.

Q. Some stitches taken in it?
A. Yes.
Q. You staid there about five or six days?
A. Went on Monday and left Saturday night.
Q. This accident occurred on Monday.
A. Yes.
Q. What time of day did the accident occur?
A. About ten o'clock.
Q. Bright clear day?
A. Yes.
Q. When you reached at the train you had your eyes and mind on getting on that train?
A. Yes.
Q. Watching the way you were going?
A. Yes.
Q. And you stepped on thie piece of coal and your foot turned and you fell and caused this injury—that right?
A. Yes.
Q. You said something about a jerk while ago—you said it was unusual jerk; you made a report of this, signed a statement as to how this happened—did you not?
A. Yes.
Q. Is that the statement I hand you here?
A. Yes.
A. Do you remember when you signed that?
A. No sir.
Q. You remember how long after the accident?
[fol. 54] A. If I am not mistaken the day I went there I had a letter from Mr. Bridges requesting me to get a Form 31 and fill out.
Q. The document which you say you signed?
A. Yes. He requested me to get Form 31 and fill out and mail—I think it was something like two weeks after I called for one of those blanks to fill out and not any there—they had to get them from Mobile.
Q. Did you take this home and fill it out?
A. At home—yes.
Q. You filled it out yourself?
A. Yes and mailed it back to Bridges.
Q. This is the report you filled out?
A. Yes.

Q. In answer to Question 36 on that report—I will ask you to state if that answer is in your handwriting?

A. Yes.

Q. Read the question and your answer to the jury?

A. "Q. State in a succinct way the cause of the accident? "A. Stepped on a piece of coal, gave down and missed my foot step—was thrown back and knee striking cross ties."

Q. On that occasion when you filled that out—something like two weeks after the accident—you said nothing about the unusual jerk you say the engine gave—that right?

A. I told all of them.

Q. I am not talking about that—you filled this out at your home?

A. I think I did.

Q. You mailed it in?

A. Yes.

[fol. 55] And you said nothing at that time about this jerk or lurch?

A. No.

Q. There are jerks on all freight trains?

A. Not that kind.

Q. But there are lurches or jerks?

A. No.

Q. Then a freight train moves like a passenger train, no jerks or lurches or slack running in or out?

A Slack running in.

Q. And that does jerk and lurch the train?

A. To a certain extent.

Q. When you were on a train you have had such a severe jerk as you had here?

A. No.

Q. You never had that?

A. No.

Q. This was a jerk such as you never experienced before on a train—that right?

A. Yes.

Q. You swore as to the jerk on your former trial did you not—we went into that at length?

A. I don't remember if I did I didn't understand just how you meant about it.

Q. But we did ask you questions about that?

A. Yes.

Q. State to the jury if you did not tell them "it was an

unusual jerk for a man trying to get on the train but not an unusual jerk for the men on the train?

A. I don't remember saying that.

[fol. 56] Q. You don't remember saying anything about that?

A. No.

Q. Is it not a fact that on the former trial of this case you were asked these questions:

"Q. This lurch you got there was just such a lurch as is usual in the operation of railroad trains?

"Q. No it was not.

"Q. How was it?

"A. He had not gotten the train in full motion.

"Q. In starting out a freight train it is the usual lurching, the pulling out, getting the slack out?

"A. As a usual thing the engine will give it.

"Q. And you knew that pulling it out there would be a lurch and jerk—that correct? And you said Yes.

"Q. And this was just such a lurch as you get in pulling freight trains out?

"A. Yes."

Q. You did not testify to that?

A. No.

Q. You did not swear to that at all?

A. I don't remember swearing to it?

Q. If you did swear to it on the former trial was it true or not?

A. I would not think so—if I swore to it I did not understand your question.

Q. Is there anything difficult to understand about the question?

A. Yes.

Q. You remember on a former trial had on November, 1924 that I asked you this question:

"Q. You told me this morning this was the usual lurch, did you not?

[fol. 57] "A. No.

"Q. You said it was the usual lurch in pulling out; answer my question yes or no?

"A. No."

Q. You said this morning—in pulling out they always gave that lurch?

A. Not that way.

—. Is it not a fact that when a train is standing that slack runs either in or out?

A. At times.

Q. That was on a straight track?

A. Yes.

Q. Then you went back and caught the train?

A. Yes.

Q. And that you had run about forty feet?

A. Yes.

Q. You did not say on the former trial that the lurch you said the train gave or the jerk was not such a jerk as is frequently had on trains when the men are on the ground—did you say that or not?

A. I don't remember. I remember telling you if the engineer had reversed his air brakes in control the slack was in the train would roll itself.

Q. Did you say it was the usual jerk for men who were on board?

A. I said it was the usual jerk.

Q. Did you on the other trial?

A. Yes.

Q. What you said on the other trial was true?

A. As far as I understood.

Q. You did not answer a question you did not understand did you?

A. You might have asked some I might not — thoroughly understood.

Q. You can understand about lurches?

A. Yes.

Q. There are sudden jerks—there are sudden stops and everything like that happens to trains.

A. You mean such lurches as that in this train?

[fol. 58] Q. In the operation of all freight trains—there are sudden jerks and stops and things of that kind that——

A. Some places I have seen such jerks as that.

Q. You have seen such jerks as that?

A. I have—not in local freights.

Q But you have on freight trains?

A. I have.

Q. And this sort of freight trains?

A. No.

Q. What is the difference between a local freight and a through freight?

A. Thru freight carry freight—long hauls from Laurel to Mobile.

Q. That is about the only difference?

A. Yes—local freight works all small places.

Q. You had an X-ray made of your knee?

A. Yes.

Q. You know who made that?

A. Yes.

Q. When was that made?

A. I don't remember the date.

Q. You say Dr. Blount treated you?

A. Yes.

Q. You don't know who made the X-Ray?

A. Yes.

Q. Who made it?

A. Dr. McCormick.

Q. At his office?

A. Yes.

Q. You know when that was made?

A. No.

[fol. 59] Q. That was made after you quit?

A. It was about the time I quit—I was laying off at the time.

Redirect examination:

Q. You say you went back *and* the 2nd day of July?

A. Yes.

Q. Why did you quit?

A. I had to.

Q. Why?

A. Unable to work any longer.

Q. Next time you went to work was on the 9th day of August — was not able to work at the time?

A. No.

Q. After August 9th—state if you were able to work then.

A. I was not able to work, but I had to work if I could keep going.

Q. At the time you quit were you able to hold the job as brakeman?

A. No.

Q. And you say not able to hold the job of brakeman now?

A. No.

Q. I notice this release here says: "for $1.00 and other valuable consideration," and you say that was to pay you for time lost?

A. Yes.

Q. They did not do that?

A. No.

Q. And they got your release for $1.00 and would not pay you the other?

[fol. 60] A. Yes.

Q. At the time you signed this release — state if you signed it relying upon the fact that they were going to pay you then and there for the full time?

A. I did.

Q. And they did not do that?

A. No.

Q. Mr. Cooper did not read you all you testified to on the former trial of this case did he?

A. No sir.

Plaintiff rests.

DEFENDANT'S EXCEPTIONS TO EVIDENCE

Comes the defendant and moves the court to exclude the evidence offered by the plaintiff and to instruct the jury peremptorily to find for the defendant.

Overruled. Exception.

[fol. 61] Comes the defendant and moves the court to instruct the jury peremptorily to find for the defendant as to the first count of the declaration.

Sustained. Exception.

Comes the defendant and moves the court to instruct the jury peremptorily to find for the defendant as to the second count—which is the lurch.

Overruled. Exception.

Comes the defendant and moves the court to instruct the jury peremptorily to find for the defendant as to the third count.

Sustained. Exception.

[fol. 62] Miss Ellis, called by the defendant, being first duly sworn, testified as follows:

Q. Where do you live Miss Ellis?
A. First Ave. Laurel.
Q. Are you employed by the G. M. & N. R. R.?
A. Yes.
Q. What position do you hold?
A. Cashier.
Q. Of what?
A. All money taken in and paid out in Laurel.
Q. Do you work in Mr. Cases' office?
A. Yes.
Q. Who is Mr. Casey?
A. Agent for the G. M. & N. R. R. at Laurel.
Q. What does he handle—state whether or not he is the Superintendent of the road?
A. No.
Q. What does he handle?
A. Everything pertaining to the freight office.
Q. You mean everything that pertains to the freight department on the railroad or just Laurel?
A. At Laurel.
Q. State whether or not Mr. Case's position with reference to freight at Laurel is similar to the position that a local agent has with reference to passengers?
A. Yes.
Q. You stated you were cashier of his office—state what your duties are with reference to—as cashier?
A. I have charge of the funds taken in and that paid out at Laurel.
[fol. 63] Q. Did you ever see that paper?
A. Yes.
Q. What, if any, connection did you have with that paper?
A. I paid Mr. Wells on receipt of this receipt.

Q. Who took the paper after that was done?

A. I did.

Q. Where does Mr. Hargrove work?

A. Superintendent's office at Laurel.

Q. Is that in the same room where you work?

A. No sir—up stairs—he is on the second floor.

Q. Is Mr. Hargrove employed in Mr. Case's department?

A. No.

Q. In whose department?

A. The Superintendent's.

Q. The Superintendent's?

A. Yes.

Q. State whether or not you paid W. F. Wells a dollar?

A. I did.

Q. What, if anything, was done with the release?

A. This is the release kept in our office.

Q. Then what did you do with them?

A. Turn them over to—send this release to our Auditor's department.

Q. Was this handled as all similar releases?

A. It was.

Q. State to the jury what your authority is generally with reference to releases of this kind—the so called $1.00 release.

A. When the release is properly signed and presented to our office we pay the party that brings the release $1.00 and we keep the release and he takes the $1.00.

[fol. 64] Q. You don't know what went on upstairs between Mr. Hargorve and Mr. White?

A. No.

Cross-examination:

Q. This paper says: "in consideration of $1.00 and other valuable consideration" you just paid him $1.00?

A. Yes.

Q. You don't know what Mr. Hargrove told him he was going to pay him?

A. No.

Q. You don't know what the "other valuable considerations" were?

A. No.

Q. You do know $1.00 to a man for a broken knee cap and several bruises and cuts like this plaintiff had would not compensate him for the injury?

Object to that—it is a matter of contract and unless they show inadequacy or plead inadequacy it is not competent.

Sustained. Exception.

Q. You don't know anything about what Hargrove told Wells in order to get him to sign this release?

A. No.

Q. You don't know what Mr. Wells was accepting with reference to other money?

A. No.

[fol. 65] Q. You don't know whether Mr. Hargrove got this release in his possession by reason of fraud or not?

A. No I don't.

Q. All you know you paid out $1.00 on it?

A. Yes.

Q. That is all you know about it?

A. I know he did not get it by fraud.

Mr. W. R. Hargrove, introduced by the defendant, being first duly sworn, testified as follows:

Q. What is your name?

A. W. R. Hargrove.

Q. What position do you hold with the G. M. & N.?

A. Clerk in the Assistant General Manager's office.

Q. You are called a clerk up there?

A. Yes.

Q. The Assistant General Manager's office does what with reference to employment of men—has he anything to do with that?

A. Yes—receive the application and their approvals.

Q. Who has control of the work of the men—what office?

A. Assistant General Manager's office.

Q. You say you are a clerk there?

A. Yes.

Q. With reference to the man who was injured while in the employment,—what is the custom with reference to them getting back to work and what did you require of them before they are permitted to go back to work?

Objection. Sustained. Exception.

[fol. 66] Q. What did you require of them before they go back to work after an injury?

Object to that.

The Court: What was required as to this man?

Mr. Cobber: We want to show if this was done in the usual way.

The Court: I think he should be allowed to prove the general rule.

Overruled the objection. Exception.

A. Required to sign a release Form #45.

Q. What is that I hand you?

A. Release Form 45.

Q. Mr. Hargrove—by whom was that signed if you know.

A. Mr. Wells.

Q. When did he come to your office—if you remember?

A. Form states 18th June.

Q. Do you remember when he came?

A. I do.

Q. What was said by him—if anything to you?

A. He told me he wanted to sign the release Form 45 and go back to work."

Q. You say this is release form 45?

A. Yes.

Q. What, if any—promise did you make to him as to the payment of time lost?

A. None whatever.

Q. What—if anything—was said by you with reference to him going back and you paying him then for the time he had already lost and the time he would lose as a result of the [fol. 6] injury?

A. Payment of time was not discussed.

Q. Who handled the payment of the time and matters of that kind?

A. The payroll Bureau—in Mobile.

Q. I mean in satisfaction of injuries?

A. Claim Department.

Q. You have nothing to do with that?

A. No.

Cross-examination:

Q. You could not settle a matter out of your jurisdiction?
A. No.
Q. This was not a settlement?
A. That is the release.
Q. And this was not a settlement for a man for his injuries?
A. None whatever.

Mr. R. E. Doolittle, called by the defendant, being first duly sworn, testified as follows:

Q. What is your name?
A. R. E. Doolittle.
Q. What do you do?
A. Run a train on the G. M. & N.
Q. You remember the time when W. F. Wells was hurt at Stratton, Miss.
[fol. 68] A. Yes.
Q. Were you employed on that train?
A. Yes.
Q. You were running the train?
A. Yes.
Q. You mean by running the train you were what—engineer?
A. No—conductor.
Q. What is this I hand you?
A. Train book.
Q. Whose train book?
A. My train book.
Q. Who kept it?
A. I do.
Q. On June 2nd, does that train book show anything with reference to what train running?
A. Yes.
Q. What train was it?
A. No. 25.
Q. Where did that go from and to?
A. Union to Laurel.
Q. What kind of train was it?
A. Local freight.

Q. Was W. F. Wells employed on that train?

A. Yes.

Q. State whether or not that was the train on which he was working at the time he was injured

A. Yes.

Q. State whether or not you had in that train C. B. & Q. #134045?

A. Yes.

[fol. 69] Q. What does your train book show—if anything—with what you did with that car?

A. Set out at Newton—given the A. & V.

Q. As you sit there—do you know where that car was destined—without the aid of anything to refresh your recollection?

Objection. Overruled. Exception.

A. My record shows to the A. & V.

Q. What, if anything, does a conductor have to show the destination of cars?

A. Way-bill shows the final destination.

Q. What is this I hand you?

A. Waybill for C. B. & Q. 134045.

Q. Do you recognize that waybill?

A. Yes.

Q. Did you handle that waybill.

A. Yes.

Q. In what train?

A. No. 25.

Q. On what day?

A. June 2nd.

Q. What year?

A. 1924.

Q. State to the jury whether or not that car covered by that waybill was in the train at the time Brakeman Wells received his injury?

Object to the testimony from an instrument he has not identified yet.

The Court: I assume he can go further and connect it up.

[fol. 70] Mr. Cooper: I have not offered it in evidence.

Mr. Collins: He is testifying from it.

Mr. Cooper: I will endeavor to connect it up.

Q. Mr. Doolittle—state whether or not the indentical paper you have in your hands—known as freight way bill was handled by you on June 2, 1924 in your movement of train #25.

A. It was.

Q. Where did you receive that waybill?

A. At Union.

Q. What—with reference to the movement of this car C. B. & Q. 134045—state whether or not that waybill was used by you in any way in the way you handled that car?

A. Yes.

Q. What, if anything, controlled you, what document, if any, controls in your disposition of the car C., B. & Q. 134045?

A. The Waybill, the destination of it, where it is routed.

Q. State whether or not you received that waybill in due course of business as conductor?

A. Yes.

Q. Where did you receive it—if any place?

A. Union.

We offer the waybill in evidence.

We object to it—does not show who made it up and where he used it and whether correct.

The Court: Is there any other way you had to prove that train except by instructions you had in the waybill?

Mr. Cooper: That is all.

The Court: But for that you would not have known?

[fol. 71] Mr. Cooper: No would not have known where the car was.

Objection overruled. Exception.

We offer the Waybill in evidence.

Objection. Overruled. Exception.

Introduced and marked Exhibit "8."

Q. What is the point of origin of that car as shown by that Waybill?

Objection. Overruled. Exception.

Q. Where did that car originate as shown by that Waybill?

A. Philadelphia, Miss.

Q. Where going?
A. Holiday, Texas.

Objection. Overruled. Exception.
We are going to object to all this testimony.

Q. On the occasion in question do you remember when Wells got hurt?
A. Yes.
Q. Where were you in the train when you discovered something had happened to him?
A. In the caboose?
Q. What part of the caboose?
A. Back door.
Q. And you saw Wells?
A. Yes.
Q. What did you do?
[fol. 72] A. Stuck the air on the engine.
Q. What did that mean?
A. Stop him.
Q. Have you any appliance of any kind in the caboose that will enable you to stop it?
A. Yes.
Q. What did you do with reference to that appliance?
A. Stuck the air on him and when he stopped I backed up.
Q. What, if anything, unusual in the operation of the train occurred just prior to this accident to Wells?
A. None.
Q. Did you observe any?
A. No.
Q. What, if anything, in the nature of a usual or unusual lurch or jerk was there?
A. Not any.
Q. Who, if anyone, was in the caboose with you?
A. Keller.
Q. What is he?
A. Flagman.
Q. What is it causes the lurch and jerk about any freight train?
A. The slack running in and out.
Q. Take a freight train standing still—when it starts there is a lurch or jerk—what causes that?

A. Slack and when it starts will go out.

Q. What do you mean exactly by the slack?

A. Slack between the cars—all the drawheads have springs and slack will run in and when you pull out it will straighten out.

Q. The drawhead—is that the coupling?

[fol. 73] A. Yes.

Q. On each end of each car there is a coupling—that right?

A. Yes.

Q. You said something about a spring—where is that?

A. Behind the drawhead.

Q. Is it under the car?

A. Yes.

Q. When the cars are bunched—what happens to that spring?

A. Presses together.

Q. When the train pulls out—what happens?

A. Naturally—stretches out—pulling the drawhead away will pull the slack out.

Q. Is there any way for railroads to prevent that in freight trains.

A. Not that I know of.

Q. State whether or not that is the train you operated that day was properly equipped with brakes and couplings and draw heads etc.?

A. Yes.

Q. Was it equipped according to the standard and best known methods of cars in reference to the draw heads?

A. It was to my knowledge.

Q. How heavy was your train that day?

A. Had ten cars.

Q. Is that a heavy or light train?

A. Light train.

Cross-examination:

Q. Did you testify here in this case when on trial before?

A. Yes.

[fol. 74] Q. And you remember in that trial the question came up as to whether any cars in this train going out of the state?

A. Yes, I said my records did not show any.

Q. And you remember that the plaintiff has stated in his declaration or that we were contending that you were engaged in interstate commerce—don't you?

A. I don't remember.

Q. You know that is the question we put to you when you came on the stand—the plaintiff put you on the stand did he not?

A. I can't say.

Q. Didn't I put you on the stand and ask you the question?

A. You asked me questions about the cars.

Q. And I put you on the stand for the purpose of proving you were at that time engaged in interstate commerce—didn't I do that?

A. I think you did.

Q. And was not that the question I asked you?

A. I can't say.

Q. That is all we asked you about?

A. You just asked me about the trains and I told you what I had.

Q. I asked w-ere the train was going?

A. I told you.

Q. You did not tell it was going to Texas?

A. I told you I didn't know.

Q. And didn't I ask you if anyone in Mississippi knew?

A. I can't say.

Q. And didn't you tell me not a man in Mississippi could tell where this train or any part of it was going?

A. No.

Q. And didn't you tell me you didn't have the records [fol. 75] and could not tell where the train was going?

A. I said I had my records.

Q. And you could not tell the jury at that time where any part of the train was going?

A. I told them.

Q. You did not say anything about Texas—and I asked if any car was going out of the state and you could not tell me—that is tru-?

A. I don't think it is.

Q. And don't you know the plaintiff took a non-suit in that case because of the fact you said—with the other agents of the company that it could not be proven it was engaged in interstate commerce?

Objection. Overruled. Exception.

A. You did not say anything about that.

Q. You knew why we took a non-suit—and you knew how this case eneed—did you not—that is true is it not?

A. No answer.

Q. You were not ignorant of what happened when you went out?

A. I didn't know what had happened.

Q. You don't know how the plaintiff got hurt do you?

A. Only what he said.

Q. You were in the caboose at the time?

A. Yes.

Q. And you had started off?

A. We had started off.

Q. The train was running.

A. Yes.

Q. And this man had gone to throw a switch—you knew that?

A. I knew he threw the switch before we started off.

[fol. 76] Q. You knew where he was?

A. I knew up about the head end.

Q. When you started off?

A. Yes.

Q. You told him to go throw the switch?

A. No—that was one of his duties.

Q. It was in your line of duty to know where the men were when you started off?

A. Not necessary.

Q. Was it in the line of duty for the engineer when he started off?

A. To know where they were around the train?

Q. Suppose one was under the train?

A. Just be under.

Q. But his duty to know about that?

A. He watches on his side.

Q. Who watches the others on the other side?

A. They take care of themselves.

Q. No one to take care of them?

A. No.

Q. What does the fireman do?

A. Keeps steam.

Q. Suppose they wanted a signal from the left who would take it?

A. Fireman.

Q. Then, when the train is on the left hand side the fireman takes the signals does he not?

A. Yes.

Q. So he acts instead of the engineer?

A. He passes signals to the engineer.

Q. Engineer looks out for the men on the right hand side and the fireman takes the signals on the left hand side?

A. Yes.

[fol. 77] Q. Did the train ever give an unusual lurch?

A. Sometimes.

Q. Did that train ever give an unusual lurch?

A. Not that morning.

Q. I said—at any time?

A. Got a long cut—of course it does.

Q. Sometimes gives an unusual lurch?

A. No.

Q. Never gave an unusual lurch?

A. Hardly ever have a long enough cut of cars.

Q. You say that train never did give an unusual lurch?

A. Not unless we got a long cut of cars.

Q. Did it or not?

A. No.

Q. Never did—and that is the reason you know it did not at this time?

A. Yes.

Redirect examination:

Q. What do you mean by long cut of cars?

A. A heavy train—25 of 30 cars.

Q. What character of train you say this was?

A. Local freight.

Q. State whether or not that was heavy or light in the matter of number of cars?

A. Just a medium size string for us.

Q. For what local or thru freight?

A. Starting out that way, always have a light train.

Q. Was it classed as freight trains or was it light or heavy?

A. It was light.

[fol. 78] Q. With reference to this Way bill, Mr. Collins asked you about, when you delivered a car to a connecting line what did you do with the Waybill?

A. Gave — to the agent at that point.

Q. Do you know what the agent did with the Waybill?

A. No.

Recross-examination:

Q. Did you ever put any notation on the Waybill?

A. At blind sidings.

Q. Did you put any on this Waybill?

A. That was not a blind siding.

Q. You don't know what became of the Waybill do you?

A. No.

Q. You don't know what became of this Waybill?

A. I turned it over to the agent.

Q. You don't know where it came from?

A. Philadelphia, Miss.

Q. You don't know of your own knowledge—was not there?

A. No—but I recognize the Waybill.

Q. How do you recognize it from other Waybills.

A. By the car number.

Q. Could not another Waybill have the same car number on it?

A. No sir.

Q. Could not have it?

A. Not a car like that.

Q. Then you say — could not be a Waybill made like that but that one?

A. Could be one made but this is the original Waybill.

[fol. 79] Q. And you identify it by the car number?

A. Yes.

Q. How long since you saw that Waybill.

A. June 2nd—1924.

Q. Nearly one year?

A. Yes.

Q. How many Waybills — you handle?

A. Have lot of cars.

Q. You tell the jury you can identify every Waybill that comes before you?

A. Yes with my train book.

Q. You say the run in of the slack gave a lurch—does not the engine sometimes give a lurch to a train?

A. Yes.

Q. And if a light train be more liable to give a lurch than a heavy train?

A. Would not give the lurch—would not be necessary.

Q. You say it is unnecessary?

A. To get the train started.

Q. But if you wanted to start off fast sometimes go with a swing?

A. Did not start off fast—started gradually.

Redirect examination:

Q. Did you state what caused the lurch usually—did I ask you that question?

A. Yes—the slack running in and out of the train.

Q. You said while ago that the engine gave a lurch—what did you mean by that?

A. When starting a heavy train.

Q. What caused the lurch then?

[fol. 80] A. Have to back up and take slack and go ahead to get started.

Q. State whether or not it is the slack then that causes the lurch?

A. Yes, the slack bunches and gradually pulls it out in a heavy train.

Miss Minnie L. Atkinson, called by the defendant, being first duly sworn, testified as follows:

Q. What is your name?

A. Minnie L. Atkinson.

Q. What business are you engaged in?

A. Office nurse for Drs. McCormick and Gatlin.

Q. Does Dr. McCormick make X-rays?

A. Yes.

Q. I will ask you if you have ever seen this before?

We object to all this testimony.

Jury is here excluded.

Q. You say you were working there in 1924 as office nurse for Dr. McCormick?

A. Yes.

Q. In September 1924, I will ask you to state whether or not Dr. McCormick made an X-Ray picture of the knee of W. F. Wells.

A. He did.

Q. I will ask you to take that package I hand you and tell what that is?

A. W. F. Wells' X-Ray.

[fol. 81] Q. Did you do the writing on the back of that?

A. I did.

Q. Look on the inside—please—and tell the court what that is—you have?

A. Picture of the man's knees—we have two views of it.

Q. Do you know what time that was taken?

A. September, '24—should be on here.

Q Is there anything on the envelope that might refresh your mind?

A. We made it on September 24, 1924.

Q. Do you know of what leg that is?

A. Right.

Q. Is it right or left?

A. I don't remember.

Q. Is any notation made on there?

A. Yes—always made on the picture.

Q. Do you see it up there?

A. Yes.

Q. That reads there——

A. Left knee—we have the number you see.

Q. What does that show—right or left?

A. Left.

Q. What is the other?

A. Both, the left knee—two different positions.

We offer that in testimony.

Marked Exhibit "9."

Objection. Sustained. She did not make the picture. Exception.

Q. Do you know of your own knowledge this is the picture made by Dr. McCormick of his knee?

A. Yes I know it is.

[fol. 82] Dr. C. H. Ramsey, introduced by the defendant, being first duly sworn, testified as follows:

Q. What is your name?
A. C. H. Ramsey.
Q. Live here in Laurel?
A. Yes.
Q. What are you?
A. Physician and Surgeon.
Q. How long have you been such surgeon and physician?
A. Been here 21 years.
Q. Been practicing medicine in Laurel—21 years?
A. Yes.
Q. Has your practice been of a general nature.
A. Yes.
Q. What education did you have?
A. Took the regular course at a Medical College—got my degree from the Southern College of Physicians & Surgeons, Atlanta.
Q. Been licensed to practice in the State of Mississippi?
A. Yes.
Q. Have you had some experience as a physician and surgeon in the reading and interpreting photographs made as a result of an X-Ray?
A. Yes.
Q. What does an X-Ray show?
A. Shows the outline of the hard tissues of the bone. Does not show the flesh.
Q. The Medical Science has accepted the X-Ray or pictures made with an X-Ray as to accurately portray the condition of the bones?
[fol. 83] A. Yes.
Q. For how long has that been accepted?
A. Practically, from the beginning of the X-Ray—the use of it.
Q. If a person had a break in June of a year—what, if anything would there be about the knee cap—what would there be about the knee cap to show whether a fracture or not in September following that June?
A. Would be a deformity.
Q. Could that be determined from an X-Ray?
A. Yes.

Q. I believe you stated you have had considerable experience in the reading of X-Rays.

A. Yes.

Q. I will ask you to take the two X-Rays pictures which the stenographer has marked Exhibit "9" and tell me what they purport to be, X-Ray of what part of the body?

A. That is a picture of the knee?

Q. What about the other?

A. Also the knee.

Q. What is the knee cap called by you Doctors?

A. The patella.

Q. I wish you would look at that picture and say whether or not any indications there has been any break or fracture of the patella?

A. No sir.

Q. Do you state it as your professional opinion that had there been a break or fracture of the patella prior to the taking of that X-Ray it would show in such X-Ray?

A. Yes.

Mr. Collins: We object to that part of the testimony that [fol. 84] undertakes to interpret the X-Ray in question.

Sustained. Exception.

Mr. Cooper: You object to all the evidence touching upon his interpretation of the X-Ray?

Mr. Collins: Yes.

Sustained. Exception.

Q. You hold in your hand two other X-Ray plates where did you get them?

A. Dr. McCormick.

Q. What are they X-Rays of?

A. Of the knee—of the patella.

Q. Does that X-Ray show a fracture of the patella?

A. Yes.

Q. Do you know that is an X-ray of the knee of a human being?

A. Yes.

We want to offer that comparatively.

Marked Exhibit "10."

Object to that.

Sustained. Exception.

Dr. R. J. B. JARVIS, called by the defendant, being first duly sworn, testified as follows:

Q. You are Dr. Jarvis?

A. Yes.

[fol. 85] Q. You are a physician and surgeon?

A. Yes.

Q. Where do you live?

A. Laurel.

Q. How long — been practicing medicine?

A. Since 1893.

Q. Thirty-two years?

A. Yes.

Q. Are you a duly licensed practicing physician and surgeon?

A. Yes.

Q. By the State of Mississippi?

A. Yes.

Q. What medical education have you had?

A. Had my college course and several post-graduate courses since.

Q. Have you had any experience in the interpretation of X-rays?

A. Yes—some. I am not an expert.

Q. State whether or not you have had sufficient experience to enable you to look at an X-Ray of a fractured bone or one that is alleged to have been fractured—to determine whether there has been a fracture?

A. Of course a bone might have been fractured in time and gotten well—and might be a case of that kind and hard to tell.

Q. Assuming the fracture was alleged to have occurred in June and the picture made in September—would it show or not?

A. It would.

Q. Your experience has been such as to qualify you to say from the exposure from an X-ray picture to say whether or not there has been a fracture?

A. Yes.

Q. I hand you two X-ray pictures marked by the Stenographer Exhibit "9"—state what part of the human body those are?

A. Leg.

[fol. 86] Q. What part of the leg?

A. Knee and shows the lower part of the femur and the upper part of the leg; and the other part of the two small bones of the fibula and tibia and the knee cap.

Q. Examine that and tell me whether or not that X-ray picture of the knee shows any fracture of the patella?

A. I don't think it does. Don't see any evidence of a fracture.

Q. Take this one?

A. That don't show the patella.

Q. Do you see the shadow?

A. Yes out here—I see no evidence in that shadow of any fracture—it is owing to the position the leg is in.

Object to all this testimony for the same reason.

Sustained. Exception.

Mr. Collins: We object to that part of the testimony that undertakes to interpret the X-ray.

Sustained. Exception.

Dr. W. N. Blount, introduced by the defendant, being first duly sworn, testified as follows:

Q. You are Dr. W. N. Blount.

A. Yes.

Q. You are a licensed physician and surgeon?

A. Yes.

Q. Licensed by the State of Mississippi?

A. Yes.

[fol. 87] Q. What medical education did you have?

A. Louisville, Ky., and two or three post graduate courses in New Orleans and at the Mayo Clinic.

Q. You are Chief Surgeon of the G. M. & N. R. R. Co.?

A. I am.

Q. You know W. F. Wells?

A. Yes.

Q. Did you have occasion to treat him?

A. I did.

Q. Remember when that was?

A. I think June of last year.

Q. 1924?

A. I think so.

Q. At that time—I will ask you to state to the court what character of injury he had?

A. He had two flesh wounds—one on each knee—small incissions.

Q. With reference to the fracture of the knee cap—what did you find?

A. Did not find any fracture.

Q. State whether or not you put it in a cast?

A. I did not.

Cross-examination:

Q. What you have testified to is information that you obtained in the relationship of patient and physician?

A. Yes.

Q. In other words—this man Wells was your patient and you his physician, and that is where you get the information you testify about?

A. Yes.

[fol. 88] Mr. Collins: We object to that. Sustained. Exception.

Redirect examination:

Q. Doctor, did you cause anyone to make an X-ray of this leg?

A. I did.

Q. For whose use was the X-ray made?

A. For his.

Q. Anyone else?

A. For my information and the railroad's information, I wanted to know whether he had a fracture or not.

Q. You know who was to pay for it?

A. G. M. & N. R. R. Co.

Objection. Sustained. Exception.

Jury is here introduced.

Defendant here and now offers to introduce in evidence testimony—taken in the absence of the jury—of Minnie L. Atkinson, Dr. Ramsey, Dr. Blount and Dr. Jarvis.

Objection. Sustained. Exception.

W. R. ALEXANDER, introduced by the defendant, being first duly sworn, testified as follows:

Q. What is your name?
A. W. R. Alexander.
Q. Where do you live?
A. 2nd Ave., Laurel, Miss.
Q. What business engaged in?
[fol. 89] A. Locomotive engineer.
Q. For what railroad?
A. G. M. & N.
Q. You remember the time W. F. Wells was injured at Stratton, Mississippi.
A. Yes.
Q. Were you on that train that day as an employee of the company?
A. Yes.
Q. What were you doing on the train?
A. Engineer.
Q. Did you see him get hurt?
A. No.
Q. Which side were you on?
A. West side.
Q. Which direction was your train going?
A. South.
Q. You don't know when it occurred?
A. No.
Q. Did you know where Wells was when you pulled out that day?
A. No.
Q. When you pulled out did you pull out in response to a signal.
A. Yes.
Q. From whom did you receive that signal.
A. From two. From Ezell, following engine (brakeman) and from the one on the rear.
Q. What signal was that?
A. Proceed.
Q. State whether or not—state how you handled your locomotive as you pulled out with reference to care?
A. Started off in the ordinary way—open throttle.
[fol. 90] Q. What, if anything, in the operation of the engine did you do that would—if you did anything—cause a sudden or unusual lurch of the train?
A. Nothing.

Cross-examination:

Q. Did the conductor signal you to go?

A. Yes.

Q. Conductor signaled you to go?

A. Yes, from the rear.

Q. It was the duty of the conductor when he gave signals to go that he knew where all the men were who work on the train?

A. I don't know that.

Q. You don't know of course how Wells got hurt?

A. No.

Q. Don't know what caused him to get hurt?

A. No.

Q. Where were you when you got your first information about him getting hurt?

A. About three or four miles from there.

Q. Did not see him when put on the train?

A. No.

Q. You didn't go back to investigate?

A. No—they pulled the air on me.

Q. You were handling a light train?

A. Yes.

Q. What causes the train to lurch?

A. Slack.

Q. When you handle a light train, of course the engineer even when the slack is all out can make it lurch?

A. No sir.

[fol. 91] Q. A sudden jerk of the engine would not make the train jerk?

A. Not jerk if the slack is all out.

Q. You say a train could not jerk when the slack is out?

A. No sir.

Q. You don't know where this man was when the train started?

A. No.

Q. You don't know how far you had run?

A. Not very far when they pulled the air on me.

Q. And you don't know how fast running at the time he was hurt?

A. I have an idea—not to be exact—but pretty close.

B. BLALOCK, called by the defendant, being first duly sworn, testified as follows:

Q. Where do you live?
A. Laurel, Mississippi.
Q. What business engaged?
A. Fireman.
Q. What railroad?
A. G. M. & N.
Q. How long been fireman?
A. Nearly seven years.
Q. Were you firing the day Wells got hurt?
A. Yes.
Q. Where was he, do you remember?
A. Stratton.
Q. After you did your work up there which side were you on—which side of the train?
A. East side.
Q. Which side was Wells on?
[fol. 92] A. East side.
Q. After you finished the work what, if any, signals passed between you and Wells?
A. I highballed Mr. Wells and he highballed me back.
Q. What do you mean by highball?
A. That means leaving a station.
Q. What does it mean when you highball a man?
A. Means that we are gone.
Q. After you highballed—what did you do?
A. I went to my duty—to firing.
Q. What do you mean—did you go anywhere to fire?
A. Down in the deck.
Q. Did you see the accident?
A. No.
Q. When was the first you knew about it?
A. When they stopped the train on us.
Q. State whether or not there was any lurch—unusual lurch or jerk to the train between the time it started and the time the train stopped—that you remember of?
A. Any unusual jerk?
Q. Jerk or lurch of the train?
A. No sir—not any.
Q. State whether or not anything was done in the locomotive to cause the train to jerk?
A. No sir—don't know anything to cause it to lurch.

Cross-examination:

Q. Could anything be done in the locomotive to cause it to lurch?

A. It could not unless slack in it—if any slack in a train it will cause a jerk or lurch.

Q. And sudden putting on of the steam would not that cause it to lurch?

[fol. 93] A. No sir not when a train starts—not after the slack is out.

Q. Was that up hill or down hill?

A. Grade.

Q. What do you mean by that?

A. Down grade.

Q. The way you were going?

A. Yes.

Q. Engine was ahead?

A. Yes.

Q. How many cars on that train?

A. About ten cars to my memory.

Q. Did that train ever give any unusual lurches?

A. Not that I know of.

Q. So all the lurches you knew anything about is a usual lurch?

A. The lurch from pulling out slack in a train is all I know anything about.

Q. And that was usual?

A. I don't know that you call it usual.

Q. Is it usual or unusual?

A. Usual.

Q. And a train never gives anything but a usual lurch?

A. In a slack train.

Q. Always a usual lurch?

A. Yes.

Q. No such thing as an unusual lurch?

A. Not after a train starts.

Q. You say you were on the left hand side of the train?

A. On the east side.

Q. That is the left hand side?

[fol. 94] A. Yes.

Q. That is when the train started?

A. Yes.

Q. Did you see Wells when the train started?
A. Did I see him when it started?
Q. Yes.
A. Yes.
Q. Where was he?
A. On the east side.
Q. What was he doing?
A. Standing by the train.
Q. Whose duty was it to take the signals on the east side of the train?
A. My duty.
Q. Whose duty was it to take signals on the west side?
A. Engineer.
Q. So you acted on the east side of the train in the same capacity as the engineer on the west side?
A. Yes.
Q. Then it was your duty to look out for the men on the east side of the t-ain, and the engineer's duty to look out for the men on the west side?
A. Sure, if the signals pass.
Q. And you knew where he was at the time?
A. That is when I got the highball.
Q. You don't know whether he was ordered to do anything after that time by the conductor do you?
A. No, sir.
Q. You don't know what became of him after you saw the highball?
A. Become of Mr. Wells?
Q. Yes.
[fol. 95] A. No sir.
Q. You didn't see him any more—you went on to shovel ing in coal.
A. Sure—I didn't see him anymore.

Redirect examination:

Q. The last signal leaving a station is what?
A. Highball.

MR. H. E. EZELL, introduced by the defendant, being first duly sworn, testified as follows:

Q. Your name H. E. Ezell?
A. Yes.
Q. You know W. F. Wells?
A. Yes.
Q. Where do you live?
A. Seventh Street, Laurel, Miss.
Q. What business engaged in?
A. Flagman, G. M. & N.
Q. You know W. F. Wells?
A. Yes.
Q. You remember the occasion when — injured at Stratton, Miss.?
A. Yes.
[fol. 96] Q. Were you on that train?
A. Yes.
Q. What position did you hold on that train?
A. Brakeman ahead.
Q. What does that mean?
A. My job—following the engine.
Q. After you did your work at Stratton did you give the engineer any signal to proceed?
A. To leave the station.
Q. To leave the station?
A. Yes.
Q. On which side were you?
A. West side—the Engineer's side.
Q. Which side was Wells on?
A. East side—fireman's side.
Q. What was the last work done there, if you remember —in Stratton?
A. Last move was to couple up the train on the main line.
Q. After that was done what signal—if any—you gave?
A. I highballed from the rear and I passed the signal to the engineer.
Q. What did you do then?
A. Got on the engine.
Q. Tell the jury what, if anything, in the nature of a lurch or sudden jerk was given between the time the train was started and the time you learned that Wells had fallen —if you remember anything.
A. I don't -member anything.

Q. State whether or not anything was done in the locomotive—if you know?

A. Nothing unusual.

[fol. 97] Cross-examination:

Q. If a person catching on the grab iron of the train and another fellow on the train—which would be in a better position to detect an unusual jerk or lurch of the train—the one on the train or the one taking hold of the train?

A. The one on the train would feel the lurch more.

Q. Better than the one taking hold of the train?

A. Yes.

Q. And tell whether it was an unusual lurch?

A. Yes.

Q. Did that train ever give an unusual lurch?

A. I would say not.

Q. Never did?

A. It did not handle enough cars.

Q. The reason you say this was not an unusual lurch was the reason it never gave an unusual lurch?

A. No answer.

W. E. Keller, called by the defendant, being first duly sworn, testified as follows:

Q. What is your name?

A. W. E. Keller.

Q. Where do you live?

A. Laurel.

Q. What business engaged in?

A. Flagman for the G. M. & N.

Q. You know W. F. Wells.

A. I do.

Q. You remember the occasion when he was hurt at the station or near Stratton?

A. I do.

[fol. 98] Q. Were you employed on that train that day?

A. I was.

Q. As what?

A. Flagman.

Q. Where does the flagman ride?

A. Rear of the train.

Q. What is that?

A. Caboose.

Q. Do you remember what you were doing—if anything—just prior to the time you received information that Wells had fallen?

A. I was sweeping out the caboose.

Q. When did you start to sweeping out the caboose before the train started or after?

A. After it started—immediately after it started—I was walking thru the caboose when it started.

Q. Is that one of your duties as flagman?

A. It is—to keep it clean.

Q. What was the first information you had that Wells had fallen?

A. Conductor Doolittle stuck the air on the train and I asked what the trouble was.

Q. When the air went on the train was when you first learned of it?

A. Yes.

Q. What position did you assume in sweeping the train, standing or sitting?

A. Standing.

Q. Between the time the train started and the time of putting on the air—state what—if anything—in the nature of an unusual jerk or lurch of the train you noticed?

A. None.

[fol. 99] Q. Did you observe any unusual lurch?

A. I did not.

Q. State to the jury whether or not there was any movement of the train that threw you in the caboose while sweeping it out.

A. No sir—no unusual movement—just a gradual starting.

Cross-examination:

Q. Suppose it had not been a gradual starting—what would happen then?

A. I can't say.

Q. Would there been any unusual lurch then?

A. No a man could not jerk a short train like we had.

Q. Just impossible to jerk it?

A. Not impossible to jerk—but a train on that grade.

Q. That was down grade?
A. Yes.
Q. You say it was impossible to jerk that train?
A. Yes.
Q. You say you can jerk trains?
A. Yes.
Q. You can jerk with the engine?
A. If the slack is all in.
Q. You can jerk a short train better than a heavy train?
A. No.
Q. Can you?
A. You might but the cars do not jerk that way.
Q. When the slack is all in you can jerk with the engine and you say you can't jerk a light train better than a heavy train?
A. Yes, you can't jerk a short train.
[fol. 100] Q. When the high ball is given by the conductor where are the men supposed to be—whether on or off the train?
A. They are supposed to know their places and be where they belong.
Q. Where do they belong?
A. Often times in pulling out I wait and catch certain cars and catch the caboose—it is customary to get on where you want to.
Q. Is it not the duty of the conductor to know where the men are when the train starts?
A. No—a man is supposed to take care of himself.
Q. Did you see Wells at the time he was hurt?
A. Saw him afterwards.
Q. You don't know just when he was hurt—at the particular time?
A. Not the particular minute.
Q. Do you know whether that train ever gave any unusual lurch or not?
A. Did not.
Q. At any time—either that day or afterward?
A. It did not.
Q. Never did?
A. No.
Q. The jerks on that train are usual jerks?
A. Yes, if any jerks on there.

Q. No unusual jerks on that train?
A. There is at times.
Q. It does give unusual jerks at times?
A. Yes, I told you a long train could jerk them.
Q. Then a long train can be jerked?
A. Yes.
Q. And it can be jerked unusual, can't it?
[fol. 101] A. I don't know what you call unusual.
Q. What do you call unusual?
A. In a long cut of cars standing there is slack and when pulled out there is a jerk but not unusual.
Q. Do you say there is ever an unusual jerk?
A. Yes there is.
Q. What do you call it?
A. Usual jerk when there is one.
Q. How do you determine whether it is or not?
A. Two or three different ways.
Q. Tell one?
A. Suppose I was up in the caboose and you make a sudden jerk—slack runs back and there would be a awful jerk—that would be a sudden jerk.
Q. What would cause that?
A. Slack running out the train.
Q. Would it have been usual—could the engine jerk it after the slack run out?
A. Engine can't jerk it after the slack runs out.
Q. That was down grade?
A. Yes.
Q. You don't know how this boy got hurt?
A. I did not see him.
Q. You know where the conductor was?
A. In the caboose.
Q. You know what he was doing?
A. I believe he was writing up some waybills—I don't remember exactly.
Q. You and the conductor in the caboose?
A. Yes.
Q. That the only two members of the crew you know where they were?
A. Yes.

Defendant rests. Plaintiff rests.

[fol. 102] Stenographer's certificate to foregoing transcript of evidence omitted in printing.

Bond on appeal for $4,000, approved and filed June 4, 1925, omitted in printing.

[fol. 103] Cost bill omitted in printing.

[fol. 104] Summons and sheriff's return omitted in printing.

[fol. 105] Exhibit 8 in evidence omitted; see Exhibit "A," printed side page 11 ante.

[fol. 106] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] In Supreme Court of Mississippi

No. 25302

Gulf, Mobile and Northern Railroad Company, Appellant,

vs.

W. F. Wells, Appellee

Assignments of Error—Filed November 19, 1925

Appellee assigns as error the action of the court below in the following particulars:

1. The court erred in not directing a verdict for the appellant.

2. The court erred in not granting appellant the instructions shown by the record to have been refused.

3. The court erred in overruling appellant's motion for a new trial.

4. The court erred in excluding the evidence of Miss Atkinson, Dr. Ramsey and Dr. Jarvis.

5. And for other reasons to be assigned on the hearing thereof.

Welch & Cooper.

Opposing counsel duly served.

—— ——.

11/15/25.

[File endorsement omitted.]

[fol. 108] Minute entry of argument and submission omitted in printing.

[fol. 109] In Supreme Court of Mississippi

[Title omitted]

Judgment—January 25, 1926

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Jones County, second district, and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court, rendered in this cause at the March term 1925 on April 15th, 1925 be and the same is hereby affirmed, and that the appellee do have and recover of appellant and Ellis B. Cooper and W. S. Welch, sureties in the supersedeas bond, the sum of $2,000.00, the amount of the judgment in the court below, together with the further sum of $100, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said judgment from date of rendition in the court below until paid at the rate of 6 percentum per annum and also the costs of this cause in this court and in the court below, to be taxed, etc.

[fol. 110] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR—Filed February 8, 1926

The court saw fit to affirm this case without an opinion. We are not desirous of adding to the court's burden by filing a suggestion of error, but we want to ask again the reconsideration of the record in this case in view of what we say here.

This case clearly is one to be determined by the Federal Employers' Liability Act. There is no dispute about this and there can be no dispute about it.

It is also clear that the second count of the declaration is the count upon which the case is before this court. It is also clear that this count alleges negligence on the part of the engineer in giving the train a sudden and unnecessary jerk.

It is unnecessary to call to the attention of this court the fact that the appellee, plaintiff below, is unaided by any presumption of negligence. The Supreme Court of the United States has held numbers of times that the mere happening of an accident will not warrant a recovery but there must be shown negligence on the part of the railroad company or on the part of some employee, Railroad Co., v. Horton, 233 U. S. 492, 58 L. ed. 1062; Railroad Co. v. Wagner, 241 U. S. 476, 60 L. ed. 1110; Railroad Co. v. Gray, 241 U. S. 333, 60 L. ed. 1030.

"The Federal Courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish."

[fol. 111] This was said in Railroad Co. v. Harris, 62 L. ed. 1167, 247 U. S. 367, this count being thereby reversed.

Assume for the sake of the argument that the jerk was unusual and unnecessary. Assume that appellee was thereby injured. Still we most respectfully insist that there is no liability. And the basis of this insistence is this:

(1) Appellee does not attempt to answer that the engineer did anything to cause the jerk.

The record shows that appellee was ten cars back of the engine. This is not disputed. The record shows, and appellee admits, that as he ran to the train he had his eyes on where he was going. This is undisputed. The record shows that the engineer was on that side of the train opposite to the appellee. This appears without dispute.

Under the above undisputed facts it necessarily appears that appellee knew nothing about what caused the jerk which he says was unnecessar*ily appears*. His testimony shows that it was physically impossible for him to see the engineer if he had been looking. But in addition to that it shows that he was not looking.

These facts are undisputed. They came from the appellee himself. It seems to us that the conclusion is inescapable that appellee in no direct sense throws any light on the cause of the jerk.

(2) But it will be urged that appellee says there was a lurch or jerk. There is room for an inference that the engineer caused it.

Let us look at this in the light of the undisputed facts. The engineer says he did nothing to cause it. This is undisputed. The fireman says he saw him do nothing to cause it. This is undisputed. The head brakeman who [fol. 112] was on the engine says he did nothing. This is undisputed.

So to meet the inference, or, to use a better and more accurate term, conjecture that there was something done by the engineer crew that caused the jerk or lurch, we have the undisputed, and unimpeached, testimony of the only three men on earth who do know what the engineer did.

Certainly this effectually disposes of the inference or conjecture if positive and direct testimony is ever to accomplish such a result.

And in addition to this the entire train crew swear that it would have been physically and mechanically impossible for the engineer to cause such a lurch or jerk while the train was in motion. And appellee admits the truth of this for he did not, though he had the opportunity, even attempt to deny it.

If this undisputed and unimpeached testimony does not completely meet the inference or conjecture, how, we respectfully ask, may it be done?

But you say, the jerk or lurch occurred and this disputes the testimony of the engineer, the fireman and the brakeman who said the engineer did nothing. The jury has evidently found that there was such a lurch or jerk. If the engineer, the fireman and the brakeman speak the truth, what could have caused this jerk or lurch? The record shows without the semblance of dispute that if such a jerk occurred, and we are now assuming that it did, it occurred as a result of slack running in or out. Appellee on page 62 says:

"Q. Then a freight train moves along like a passenger train no jerks or lurches or slack running in or out?
A. Slack running in.
Q. And that does jerk and lurch the train?
A. To a certain extent."

[fol. 113] All of appellant's witnesses swear to the same effect. Not only are they not disputed on this. They are corroborated by appellee himself.

We start out with a jerk or lurch, the source of which appellee does not say. We show without dispute that no member of the crew caused it. We show by appellee himself that slack could have caused it.

And the record shows, too, that slack is in all trains; that the best equipment of standard trains have this slack.

Then under the undisputed evidence in this record the jerk was caused by slack.

Has this court any right to reject undisputed testimony? It certainly has never exercised that right, if it has it. Yet to affirm this case, this court is bound to reject the undisputed testimony of the engineer, the fireman and the brakeman as to the handling of the locomotive. And to reject it for what? A bare conjecture that if the lurch occurred the engineer must have caused it. And this, too, in the face of appellee's testimony that slack causes jerks or lurches. And in the face of the undisputed and unimpeached testimony of the entire train crew to the same effect.

We desire here to quote the principles applied by the Alabama Court in Ry. Co. v. Dickson, 100 So. 667:

"Counsel's insistence is that, conceding the fact of the jerk or jar, the evidence shows that it might have been the

result of any one of four distinct agencies: (1) The jamming of the air; (2) the sticking of the brakes; (3) the rolling up of the slack (there being 49 cars); or (4) the act of the engineer—and that, as to any causative action by the engineer, the affirmative conclusion required could [fol. 114] not be grounded on anything more than conjecture. As this court has often declared, findings of fact based on conjecture merely cannot be upheld. (Cited authorities). As said in Southworth, Adm'x, v. Shay:

"Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause."

(II) But a nice discrimination must be exercised in the application of this principle. As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a judicial basis for such a determination, notwithstanding the existence of other plausible evidence.

We have examined with critical care the testimony bearing upon these questions and issues; and, while it might fail to reasonably satisfy our minds that any negligent act of the engineer—that is, any act not necessarily incidental to the operation of his train, causing a sudden and violent [fol. 115] jerk or jar to the cars, and done with notice of the probable presence of plaintiff in a place of peril while serving at his post of duty on one of the hindmost cars—proximately caused plaintiff to be thrown from the train and injured, yet we think the evidence, especially the testimony of plaintiff, his fellow employe—Gaffney, and the engineer, Ledford, is sufficient to support such a finding. We would like to review the evidence in detail, but space does not permit, and the statement of our general conclu-

also must suffice. We think that the general affirmative charge for defendant was properly refused."

How is this applicable here?

Concede for the argument that the jerk could have occurred from some act of the engineer. Still the same proof shows that it might have resulted from slack. In this state of the case the above quoted law says that "it does not warrant the conclusion that it did so occur" from the act of the engineer.

But the instant case goes further and shows by undisputed and unimpeached testimony that the engineer did nothing.

In the cited case the evidence showed that the engineer's act did cause it. Here it shows that he did not. If the evidence disclosed that the jerk could have been caused by no other condition or act save the act of the engineer, this could affect the case. But the evidence not only completely rebuts the conjecture that the engineer caused the jerk but it shows indisputably that there was another cause.

We submit with all deference but with earnestness that the above alone shows that the court erred in affirming this case.

[Col. 136] The foregoing assumes that there was an unusual jerk. It assumes that the jerk was a negligent one if caused by the engineer. But the record here shows that the jerk was not unusual under all circumstances.

Appellee says that had he been on board the train the jerk would not have been unusual. But that it was unusual to a man on the ground.

Assume, therefore, that the engineer did cause the jerk. According to appellee's statement it was only negligent to one on the ground.

In other words, under some circumstances it was negligent. Under others it was not. Is it not sound law and sound common sense that under these circumstances it was necessary to show that the circumstance or condition which rendered the act negligent were known to the person who performed the act? The Dickson case, supra, and other cases cited by us hold this.

The record in this case shows without dispute that the engineer did not know that appellee was on the ground. It

not only shows this but it goes much further and shows that the men on the engine had every reason to believe that appellee was on board.

His signal set the train in motion. He indicated to them his readiness to depart. They started.

The discussion of this in the other brief is full. We ask a reconsideration of this. We respectfully submit appellee's own testimony coupled with the undisputed testimony in the record discloses no negligence.

Respectfully submitted, Welch & Cooper, Ellis B. Cooper.

Opposing counsel served.

[File endorsement omitted.]

[fol. 117] In Supreme Court of Mississippi

[Title omitted]

Order Overruling Suggestion of Error—February 22, 1926

This cause coming on to be heard on the suggestion of error filed herein and this court having sufficiently considered same doth order and adjudge that said suggestion of error be and the same is hereby overruled.

[fol. 118] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 3, 1926

The petition herein for a writ of certiorari to the Supreme Court of the State of Mississippi is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2372)

Office Supreme Court, U. S.
FILED
MAR 31 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1[redacted]39

GULF, MOBILE AND NORTHERN RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ELLIS B. COOPER,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

GULF, MOBILE AND NORTHERN RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of the Gulf, Mobile and Northern Railroad for a writ of certiorari directed to the Supreme Court of Mississippi respectfully shows:

1. Respondent, W. F. Wells, filed his declaration against petitioner in the Circuit Court for the Second Judicial District of Jones County, Mississippi, for an alleged injury sustained by him on June 2, 1924, at or near Stratton, Miss. Respondent alleged that petitioner operates a line of railroad from Mobile, Ala-

bama, through Mississippi to a point in Tennessee and was engaged as a common carrier of freight and passengers (R., p. 1). It was further alleged therein that respondent was employed by the petitioner as a brakeman on its local freight trains. The declaration is in three counts. (*a*) The first count alleged that while respondent was engaged in the execution of his duties as brakeman and while boarding a train on June 2, 1924, he stepped upon a lump of coal negligently left by the track, which caused him to stumble and fall, breaking a knee cap and spraining his ankle (R., p. 1). (*b*) The second count, after a repetition of the allegations of the relation of master and servant between petitioner and respondent, alleged that while respondent, in the execution of his duties as a brakeman, was attempting to board the train on which he was working he stepped upon a piece of coal and stumbled and as he stumbled the "engineer on said train gave a very sudden and very unnecessary jerk of said train" and carelessly and negligently jerked respondent from the train, causing the injuries stated in the first count (R., p. 3). (*c*) The third count, after the statement of the preliminary facts, alleged that the train was being operated within the corporate limits of Stratton, Miss., at a speed in excess of six miles per hour, the statutory rate of speed in Mississippi for the operation of a train within the limits of a municipality, and that this speed, together with the lump of coal, occasioned the injury (R., p. 4). Judgment for $10,000 was demanded.

2. To this declaration petitioner, among other pleas, interposed the plea of not guilty, with notice thereunder that it would offer evidence to show that at the time and place of injury petitioner and respondent were engaged in interstate commerce, and that his cause of action, if any, was governed by the Federal Employers' Liability Act (R., p. 6).

3. At the close of respondent's case in chief the trial court directed a verdict for petitioner on the first and third counts. The second count, involving the sudden and unnecessary jerk of the train by the engineer, alone remained for consideration. Upon this count the judgment and all later proceedings are based.

4. On the trial of the cause respondent testified, as the certified copy of the record filed herewith shows, that he was employed by the petitioner as brakeman (R., p. 18); that the crew consisted of an engineer, a fireman, a conductor, a head brakeman, a flagman, and the respondent, who was the swing brakeman (R., p. 20); that the train was a local freight train (R., p. 19). He testified that when they reached the station called Stratton some switching was done in which he participated (R., pp. 20-21); that when this switching was completed he was on the side of the train that the fireman was on; that the train had about ten cars in it; that while standing at or near the caboose, which was at the end of the train, that he signaled the fireman in the locomotive that he was ready to go, meaning that the work at the station had been completed and the train should proceed; that after giving this signal to

the fireman he was directed by the conductor to throw a derail on an adjoining track; that he accomplished this and started back to catch the train; that the train was then in motion and had moved 50 feet; that he was accustomed to catching moving trains; that as he approached the train he had his eyes on the course he was traversing (R., pp. 26-30). In respondent's words, he "throwed the derail and cut straight across to get to the caboose; the train was running not over eight or ten miles per hour when I went to catch the caboose, and this big lump of coal, about as big as your fist, was there, and as I grabbed the grab iron I stepped on this piece of coal and the engine gave an unusual jerk and that threw me and my knee struck on the cross-ties" (R., p. 21). On cross-examination respondent swore that the jerk was the usual jerk for men on board the train; that to a certain extent the running in and out of the slack between the cars caused jerks and lurches; that he was acquainted with the effect of slack in the running of trains (R., pp. 26-30).

5. At the close of the case in chief for respondent, respondent being the only witness in his behalf, petitioner moved the court to exclude the evidence on the second count of the declaration and direct the jury to find for petitioner. This motion was overruled and exception duly noted. Similar motions on the first and third counts were sustained (R., p. 41).

6. The conductor testified that in the train on which respondent was working was a car moving from Philadelphia, Miss., to Holliday, Tex. (R., pp. 48-49); that

he and the flagman were in the caboose at the time of the accident (R., p. 49); that there was nothing in the way of an unusual jerk or lurch observed by him (R., p. 49); that when he saw that respondent had fallen he stopped the train by means of an appliance in the caboose; that jerks and lurches are caused by the slack between cars caused by springs behind the drawheads or couplers; that this is the standard construction, and that the train at the time of the accident was equipped with the best known equipment and was in good condition (R., p. 50).

The flagman swore that at the time of the accident he was sweeping out the caboose; that he was standing; that there was no unusual movement of the train or lurch observed by him; that the jerks in a moving train are caused by slack (R., pp. 68-71).

The fireman swore that he received respondent's signal to go ahead; that he left his seat and went to the deck of the locomotive to fire it; that he did not know that respondent was not on board; that the engineer did nothing in the operation of the locomotive to cause the jerk or jar (R., pp. 65-66).

The engineer testified that he did not know that the respondent was not on board; that he did nothing in the operation of the locomotive to cause a jerk or lurch (R., pp. 62-63).

The head brakeman testified that after pulling out he got upon the engine and that nothing was done by the engineer to cause a lurch or jerk; that he did not know respondent was not on board (R., pp. 67-68).

This is the testimony on the feature of negligence.

7. At the close of the case petitioner requested the trial court to direct the jury to find for defendant; that this request was refused. The refusal of this instruction was a denial to petitioner of a right, privilege, or immunity granted by the laws of the United States and was a denial of the protection guaranteed petitioner under and by virtue of the statutes of the United States.

8. Petitioner requested of the trial court the following instruction:

> "The court instructs the jury for the defendant that if you believe from the evidence that the crew of the engine did not know that the plaintiff was not abroad the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train" (R., p. 14).

This instruction was refused by the court and the action of the court was erroneous. The refusal was a denial to petitioner of the protection guaranteed it by the laws of the United States, and it was the denial of a right given petitioner by the laws of the United States.

9. Petitioner requested of the trial court the following instruction:

> "The court instructs the jury that even though you may believe from the evidence that there was an unusual lurch, still if said lurch was occasioned by the slack between cars running in or out, it is your sworn duty to find for defendant" (R., p. 14).

The refusal of this instruction was a denial to petitioner of the protection guaranteed by the laws of the United States and of a right granted by the laws of the United States.

10. Petitioner shows that the jury found for the respondent and assessed his damages at $2,000; that the court thereupon, on April 15, 1925, entered a judgment against petitioner in the sum of $2,000 and costs (R., pp. 14 & 15).

11. Petitioner shows that it thereupon entered a motion for a new trial, which was overruled by the trial court (R., p. 17).

12. Petitioner shows that it thereupon prosecuted on appeal to the Supreme Court of Mississippi; that on said appeal the errors of which complaint is here made were presented to the Supreme Court of Mississippi; that the Supreme Court of Mississippi, on January 25, 1925, affirmed the judgment of the trial court, and a judgment of affirmance was duly entered against petitioner (R., p. 73); that thereafter in conformity with the practice in the Supreme Court of Mississippi, petitioner filed a suggestion of error in the affirmance of the said judgment (R., p. 74); that on February 22, 1926, the Supreme Court of Mississippi overruled the suggestion of error and an order to that effect has been duly entered in said court (R., p. 79). Petitioner shows that the Supreme Court of Mississippi is the highest court in the State, and that petitioner has exhausted its remedies in that court; that to this Court

alone may petitioner appeal for the correction of the errors herein indicated.

13. Wherefore your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, direct to the Supreme Court of Mississippi, commanding said court to certify and send to this Court, on a day certain to be therein named, the full and complete transcript of the record and all proceedings of said Supreme Court of the State of Mississippi in said case entitled, *Gulf, Mobile and Northern Railroad Company, appellant, vs. W. F. Wells, appellee*, No. 25302 on the docket of that court, to the end that said case may be reviewed and determined by this Court, as provided by section 237 of the Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Honorable Court may deem appropriate and in conformity with the said provision of the Judicial Code, and that said judgment of said Supreme Court of the State of Mississippi in said case, and every part thereof, may be reversed by this Honorable Court.

GULF, MOBILE AND NORTHERN
RAILROAD COMPANY,
By ELLIS B. COOPER,
Attorney.

STATE OF MISSISSIPPI,
County of Jones,
City of Laurel:

This day personally appeared before me, a notary public in and for said city, county, and State, I being an officer authorized by the laws of the State of Mississippi to administer oaths, Ellis B. Cooper, who, after being duly sworn, says on oath that he is the attorney for the Gulf, Mobile and Northern Railroad Company, and that he is authorized to, and does, make this affidavit on behalf of that company; that the matters and things stated in the foregoing petition are true and correct as stated, as far as he is advised and believes, and that said petition, in his opinion, ought to be sustained.

ELLIS B. COOPER.

Given under my hand and official seal this the 4th day of March, 1926.

[SEAL.]

MARY L. LEWIS,
Notary Public.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petition for writ of certiorari seeks to have this Court review the action of the court in this cause wherein the Supreme Court of Mississippi affirmed a judgment against petitioner in the sum of $2,000. Petitioner pleaded and proved that petitioner and respondent at the time of the accident were engaged in interstate commerce. Petitioner asserted rights under Federal statutes, being the Federal Employers' Liability Act of April 22, 1908, as amended April 5, 1910. These rights were denied petitioner by the trial court and on appeal the Supreme Court of Mississippi, without opinion, affirmed the judgment.

Statement of Pleadings.

Respondent filed a declaration against petitioner charging it with negligence. The declaration in each count charging that respondent was employed as a brakeman on the trains of petitioner. He charges that on June 2, 1924, he was a brakeman on a local freight, and that while so employed he was injured.

In the first count it is alleged that a lump of coal as big as the fist was negligently left on or near the track and that this was a violation of petitioner's duty to furnish respondent a reasonably safe place in which to work. He charges that in attempting to board the train he stepped upon the coal, which caused him to fall.

In the second count it is alleged that as respondent attempted to board the train he stepped on the coal and the engineer gave the train a sudden and unnecessary jerk, which caused respondent to fall and which resulted in the injury sued for.

In the third count it is alleged that the operation of a train within a municipality at a rate of speed greater than six miles per hour was the proximate cause of the injury.

Petitioner pleaded the general issue of not guilty and gave notice that petitioner and respondent at the time of the injury were engaged in interstate commerce.

Statement of Facts.

The facts disclose that respondent was engaged in the performance of his duties as brakeman on a train of petitioner. It is apparent that this train was engaged at the time in interstate commerce, one of the cars of the train having originated at Philadelphia, Miss., destined to Holliday, Tex.

When the station of Stratton, Miss., was reached certain switching was done and respondent assisted in these operations. After the completion of this work, respondent was on the left-hand side of the train at or near the caboose. This is the side on which is the seat of the fireman in the cab of the locomotive. It is, of course, opposite from the side of the engineer.

When the work was completed respondent "highballed" the fireman in the locomotive, meaning by this

that all was ready for departure. The fireman received this signal and left his seat to fire the locomotive.

At this time the conductor directed respondent to throw a derail on an adjoining track. Respondent threw the derail and returned to catch the train. Between the time of his departure and his attempt to board the train it had moved about 50 feet.

As respondent endeavored to catch the train he fell and sustained an injury. The extent of the injury was disputed.

There was no proof that petitioner knew or had reason to know that the lump of coal was at or near the track. In the absence of this proof the trial court directed a verdict for petitioner as to liability under the first count.

The Supreme Court of Mississippi has ruled that the statute fixing the maximum rate of speed at which trains may be operated in a municipality does not apply in suits brought by employees engaged on the train; and, again, the record does not show Stratton, Miss., to be incorporated. The trial court for these reasons directed a verdict for petitioner as to liability under the third count of the declaration. The case was tried on the second count and the judgment is based thereon.

Instructions of the Court.

1. Petitioner requested on the trial at the close of the case the following instruction:

> "The court instructs the jury to find for defendant" (R., p. 14).

This instruction was refused and its refusal assigned as error.

2. Petitioner requested on the trial the following instruction:

> "The court instructs the jury that even though you may believe from the evidence that there was an unusual lurch, still if said lurch was occasioned by the slack between cars running in or out, it is your sworn duty to find for defendant" (R., p. 14).

This instruction was refused and its refusal assigned as error.

3. Petitioner requested on the trial the following instruction:

> "The court instructs the jury for the defendant that if you believe from the evidence that the crew of the engine did not know that the plaintiff was not aboard the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train" (R., p. 14).

This instruction was refused and its refusal was assigned as error.

ARGUMENT.

It was, and is, the contention of the petitioner that the evidence failed to disclose any negligence on the part of petitioner or its employees. The act of negli-

gence alleged was "that the engineer gave a sudden and unnecessary lurch of the train," which threw respondent and caused the injury. That negligence must be proven is the undisputed rule of this Court in actions based on, or brought under, the Federal Employers' Liability Act. Railroad Co. *vs.* Horton, 233 U. S., 492; 57 L. Ed., 1062; Railroad Co. *vs.* Wagner, 241 U. S., 476; 60 L. Ed., 1110.

Petitioner's contention that no negligence is shown finds support in two propositions, viz:

> 1. That the declaration charges that the engineer gave a very sudden and very unnecessary jerk of the train. Petitioner submits that the record does in no way support this charge.
>
> 2. That according to the testimony of the respondent the jerk was usual, and not unusual, for men on board, but that is was unusual for men on the ground about to board the train. Petitioner submits that if such be true that, even if it be considered that the engineer in the operation of the train caused the jerk, there was no negligence shown unless it be shown that the engineer knew or had reason to believe that the respondent was not on board and was about to board the train.

No Evidence that Engineer Caused the Jerk.

Respondent swears that as he caught the grab-iron the engine gave an unusual jerk. Respondent further swears that he was ten cars away from the locomo-

tive. He swears that to throw the derail he went several feet from the train. He swears that as he reached the train he had his eyes and mind on where he was going, and that he was watching the way he was going. Respondent swears that he was on that side of the train opposite to that on which the engineer sat. At this distance from the locomotive respondent could not swear as to the cause of the jerk. Certainly he could not swear the engineer caused it.

The engineer, the fireman, and the head brakeman swear that nothing was done by the engineer in the operation of the locomotive to cause the jerk.

There is no contradiction or impeachment in any way of the testimony of these employees. Respondent does not attempt to deny that they speak the truth.

If there is in the record any dispute as to this, it comes from the very uncertain inference from respondent's statement that the engine gave a jerk. Respondent, however, admits that he was ten cars away and watching the point where he was to board.

But respondent admits that slack will cause jerks or lurches. All of the witnesses testify to this effect. The engineer swears, and he is not contradicted, that an engineer cannot by any operation of the locomotive while moving cause a jerk or lurch.

It is shown without dispute that slack is in all trains; that it is in all trains of the best construction. In other words, slack is in all trains and due to the springs behind each drawhead or coupler.

Petitioner respectfully submits that this proof utterly fails to show any negligence on the part of

petitioner or any employees. There was a jerk, we must concede in the face of the jury's verdict. That it was not caused by the act of any employee is undisputed. That slack could have caused it is admitted on all sides. In view, therefore, of this evidence, petitioner respectfully submits that the operation of the slack in the train caused the jerk; and it appearing that slack is a condition found in all trains of standard construction in good condition, no negligence is proven and certainly not the negligence charged, viz., the negligence of the engineer.

The Supreme Court of Alabama in the case of Southern Railway Co. vs. Dickson, 211 Ala., 481; 100 So., 667, in a case based upon the Federal Employers' Liability Act, said:

> "Counsel's insistence is that, conceding the fact of the jerk or jar, the evidence shows that it might have been the result of any one of four distinct agencies: (1) The jamming of the air; (2) the sticking of the brakes; (3) the rolling up of the slack (there being 49 cars), or (4) the act of the engineer, and that, as to any causative action by the engineer, the affirmative conclusion required could not be grounded on anything more than conjecture. As this Court has often declared, findings of fact based on conjecture merely cannot be upheld. As said in Southworth, Adm'x, vs. Shay:
>
> "'Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury

can with equal probability be attributed to some other cause.'

"But a nice discrimination must be exercised in the application of this principle. As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a judicial basis for such a determination, notwithstanding the existence of other plausible evidence."

Petitioner submits that the record here shows without dispute that no act of an employee caused the jerk. On the other hand, the evidence points unmistakably to slack as the cause.

Conceding for the Argument that Engineer Caused Jerk, There is no Proof of Negligence.

Respondent testified that the jerk was unusual. He does not say it was violent or unnecessary. The statement of the nature of a jerk is a matter of opinion. When pressed on this point on cross-examination the following colloquy occurred:

"Q. Did you say it was the usual jerk for men who were on board?

"A. I said it was the usual jerk.

"Q. Did you on the other trial?
"A. Yes."

It thus appears that the jerk was usual for men on board but unusual for men situated as was respondent, who was about to board the train. This leaves out of consideration that the flagman, who while standing was sweeping out the caboose, was not disturbed by the jerk and no other employee noticed it.

Petitioner submits that if, as respondent says, the jerk was "usual" for men on board, but unusual for men on the ground and about to board, that, if it be conceded that the engineer caused the jerk, the jerk was not a negligent one unless the engineer knew, or had reason to believe, that respondent was on the ground. The jerk was negligent only to one on the ground. It was not negligent in itself.

The Supreme Court of Alabama in the Dickson case, *supra*, was confronted with a case of a violent, unusual, and extraordinary jerk. It there said:

> "Our cases very clearly support the proposition that, when the act which caused the injury is specified, and is not negligent in itself, but only when the actor was chargeable with knowledge that some one was in a position of peril with respect to consequences, no breach of duty is shown without an allegation that the actor had such knowledge or was so chargeable."

And the Supreme Court of Mississippi, in the case of Austin *vs.* Railroad Company, 134 Miss., 226; 99 So., 3, said:

"Engineer on engine pushing six flat cars, who without signal applied emergency brakes, and brought the train to a sudden stop on signal from conductor, when a cow made an effort to cross in front of the train, and who thereby caused a switchman riding on the front end of the front car to be precipitated over the end of the car held not negligent in the absence of evidence that he knew that the switchman was in a position of peril, or that he should or could have given a signal."

And the Circuit Court of Appeals for the Fourth Circuit, in the case of Davis vs. Shirer, 288 Fed., 293, said:

"There remains the allegation that there was negligence in so managing the train as to cause the unusual jar. To whatever degree it was out of the common, it does not appear to have been sufficiently great to injure any of the passengers in the car. Several of the witnesses who have testified apparently were on their feet at the time it occurred, and only one complained of having lost his balance in consequence. Had the engineer any reason to anticipate that the deceased would be trying to get upon one of the cars at that time, and was he in consequence bound so to operate his train as to avoid the risk of jarring it at the moment that the decedent might be trying to get on it? It would seem that the engineer had the right to assume that the decedent was where the rule and the safety of everybody on his train required him to be, and that was somewhere not less than half a mile in the rear of his train or on his way to that point. It has been argued that the defendant may not rely upon the violation by

the deceased of this rule, because it was said it was not pleaded, and, even if it had been, this defense goes only to question of contributory negligence which does not bar the recovery. Neither contention is sound. Before any question of contributory negligence can become important, and before the defendant is called upon to make or allege any affirmative defense, the plaintiff must show that he was negligent in some manner of which the deceased had the right to complain. This, in our view, she has failed to do.

"Railroading is a dangerous occupation. A certain number of accidents will happen without the companies having fallen short of the highest care reasonably practicable."

Did the engineer know or have reason to know or believe that respondent was on the ground and about to board the train? The undisputed facts on this feature are these:

Respondent was on the fireman's side. Respondent signaled the fireman that he was ready to go. The fireman swears that after receiving this signal he left his seat and saw respondent no more. He did not know of his whereabouts. The engineer swears that he did not know that respondent was not on board. The head brakeman, who was riding on the locomotive, swears he did not know. These facts are undisputed.

Respondent, standing, as he was, by the caboose, gave the signal to move. The alleged jerk was given after the train had moved forward 50 feet. Clearly, from these undisputed facts, the engineer did not know that respondent was not on board and was trying to

board the train. On the other hand, the signal of respondent gave the assurance that he was ready and to move ahead.

The Supreme Court of Alabama, in the case of Railway Co. *vs.* Dickson, *supra*, thus announces the essentials of liability in a case of this character:

> "In order to recover in this case it was necessary for plaintiff to show: (1) That he was thrown from his position on top of the car by a jerk or jar; (2) that this jerk or jar was sudden, extraordinary, and of unusual violence; (3) that it was caused by the engineer in the operation of the train; (4) that it was not a necessary incident of such operation, and (5) that at the time of its causation the engineer knew, or had reasonable grounds for believing, that the plaintiff then occupied such a position on one of the cars that such movement would probably imperil his safety."

Applying this to the undisputed facts of this case, we have the following:

(1) Respondent was jerked off; (2) the jerk was simply unusual for one about to board; (3) it was not caused by the engineer in the operation of the train; (4) the jerk was a necessary incident to the operation of the train; (5) the engineer at the time of its causation did not know, nor did he have reasonable grounds for believing, that respondent occupied a position such that the jerk would imperil respondent's safety.

Petitioner respectfully submits that no negligence has been proven.

3.

Refusal to Charge Jury that if Slack Caused Lurch to Find for Petitioner.

The court refused to instruct the jury, as requested by petitioner, that if the lurch was occasioned by the slack between the cars running in or out the jury should find for petitioner.

The evidence shows without dispute that slack is in all trains of standard construction when in good condition. This being true, if an employee is injured by a jerk caused by such slack there is no negligence.

Petitioner was entitled to this instruction. Its application to the case and its soundness as a matter of law are beyond question.

4.

Refusal of Instruction that if Crew of Engine Did Not Know Respondent was Not Aboard to Find for Petitioner.

The court refused to instruct the jury that if the engine crew did not know that respondent was not aboard the train to find for petitioner.

The court did grant such an instruction as applicable to the entire train crew, but would not limit it to the crew of the engine.

The conductor, of course, knew that respondent was not aboard, and the record so discloses.

Respondent says that had he been aboard the jerk would not have been negligent. Petitioner has shown

that the undisputed proof discloses that respondent signaled the train ahead, and that no one in the locomotive knew that respondent was not on board.

The knowledge of the engineer is the essential element. But petitioner's request included the engine crew.

The case of Southern Railway Company *vs.* Dickson, *supra*, shows that it is the knowledge of the engineer that is material. Petitioner was, therefore, entitled to have the jury so instructed.

Petitioner respectfully submits that it was denied its rights under the statutes of the United States, and that a writ of certiorari should be granted as prayed for.

Respectfully submitted,

ELLIS B. COOPER.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

OCTOBER TERM, 1925.

In the Matter of the Petition of

GULF, MOBILE AND NORTHERN RAILROAD COMPANY

vs.

W. F. WELLS.

And now comes the petitioner herein, Gulf, Mobile and Northern Railroad Company, and moves the Court, upon a certified copy of the transcript of the record herein and upon the annexed petition, duly sworn to, for writ of certiorari, directed to the Supreme Court of the State of Mississippi, to bring before this Honorable Court the case of the Gulf, Mobile and Northern Railroad Company *vs.* W. F. Wells, recently decided by the Supreme Court of Mississippi, for such proceedings therein as to this Court may seem just, and for such other and further relief as the Court may deem the petitioner entitled.

ELLIS B. COOPER,
Attorney for Petitioner.

(14)

Office Supreme Court, U.S.
FILED
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WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted]B 39

GULF, MOBILE AND NORTHERN RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS.

BRIEF FOR PETITIONER

ELLIS B. COOPER,
Counsel for Petitioner.

[illegible] DISCUS, JACKSON, TENN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

GULF, MOBILE AND NORTHERN RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS.

BRIEF FOR PETITIONER

STATEMENT OF CASE

W. F. Wells, respondent, filed this suit against the Gulf, Mobile and Northern Railroad Company, petitioner, in the Circuit Court of Jones County, Mississippi. The declaration alleged a personal injury to respondent while employed as, and performing the duties of, a brakeman on a freight train.

The declaration is in three counts. Each count alleges that petitioner owns and operates a line of railroad as a carrier of freight and passengers from Mobile, Alabama, through Mississippi into Tennessee. In each count it is alleged that respondent was employed as a brakeman on a freight train and while so employed on June 2, 1924, he suffered a sprained ankle and broken knee cap.

The first count alleges that petitioner owed respondent the duty to furnish him a reasonably safe place in which to work; that petitioner failed in this duty and permitted a piece of coal to be on or near the track; and that respondent stepped upon the coal in attempting to board the train, stumbled, fell, and sustained the injuries for which suit is brought. (R., p. 2).

At the close of respondent's case, the trial court on motion directed a verdict on this count and it is of no concern to this court. (R., p. 41.)

The third count bases liability on the operation of the train within a municipality at a greater rate of speed than six miles per hour. (R., p. 4.) At the close of respondent's case, the trial court directed a verdict for petitioner on this count and it is of no concern here. (R., p. 42.)

The second count presents the act of negligence upon which the case went to the jury. The negligence charged is in these words:

> "——— the plaintiff undertook to get on the said freight train at a time when the train was moving, as it was his duty to do, and as he caught hold of the hand iron on the said train and started to get on the said train he stumbled on a piece of coal which was negligently left on the yard; and just at the time he stumbled the engineer on said train gave a very sudden and very unnecessary jerk of said train, and carelessly and negligently jerked him from said train and caused him to fall to the ground, causing him to suffer serious and permanent injury, which is more fully set out herein." (R., p. 3.)

Petitioner filed several pleas including the general issue with notice thereunder that evidence would be offered to show that petitioner and respondent at the time of the injury were engaged in commerce between the states. (R., p. 6.) The other pleas are of no concern here.

The facts disclose that respondent was engaged in the performance of his duties as brakeman on a freight train of petitioner. That the train was an instrument of interstate commerce is without dispute inasmuch as one of the cars of the train originated at Philadelphia, Mississippi, destined to Holliday, Texas. (R., pp. 47, 49.)

When the station of Stratton, Mississippi, was reached certain switching was done and respondent assisted. After the work was done at Stratton, respondent was on the left hand side of the train at or near the caboose. This is the side on which is the seat of the fireman in the cab of the locomotive. Respondent "high-balled" the fireman, meaning thereby that he was ready for departure. The fireman received respondent's "high-ball" signal and left his seat.

Just after the "high-ball" signal, the conductor directed respondent to throw a derail on an adjoining track. The train was set in motion and had traveled about 50 feet when respondent returned to catch it. As he did so he sustained the injury complained of due to an unusual lurch or jerk of the engine. The extent of the injury was seriously contested. Petitioner's evidence was in the nature of x-ray photographs and their interpretation by experts. This was excluded because of a statute of Mississippi which provides that all communications between physician

and patient shall be privileged. (R., pp. 55 to 63, inc.)

Petitioner's evidence is that the lurch or jerk was occasioned by slack, if there was such a lurch or jerk. The crew of the engine swear that they did nothing to cause a jerk or lurch. It further appears that the engineer could not cause a jerk or lurch while the train was moving and that slack is a condition found in all trains of standard construction and in good condition.

A detailed statement of the facts is necessary to the presentation of the first specification of error.

There was a verdict for respondent and an appeal to the Supreme Court of Mississippi where the judgment was affirmed without an opinion. (R., p. 73.) Suggestion of error was filed and overruled. (R., p. 79.)

At the close of the evidence petitioner requested the court to direct a verdict for petitioner. This was refused. (R., p. 14.) And petitioner requested two other instructions pertinent to the issues which were refused. (R., p. 14.)

Specification of Errors.

1. There was error in refusing to grant petitioner the following instruction:

> "The court instructs the jury to find for defendant." (R., p. 14.)

2. There was error in refusing to grant petitioner the following instruction:

> "The court instructs the jury for the defendant that if you believe from the evidence that the crew

of the engine did not know that the plaintiff was not aboard the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train." (R., p. 14.)

3. There was error in refusing to grant petitioner the following instruction:

"The court instructs the jury that even though you may believe from the evidence that there was an unusual lurch, still if said lurch was occasioned by the slack between cars running in or out, it is your sworn duty to find for defendant." (R., p. 14.)

Brief of the Argument.

1. Under the Federal Employers Liability Act negligence must be proven. Railroad Co. *v.* Horton, 233 U. S. 492; 57 L. Ed. 1062; Railroad Co. *v.* Wagner, 241 U. S. 476; 60 L. Ed. 1110.

2. Where the declaration charges "that the engineer gave a sudden and unnecessary lurch of the train" which caused the injury for which the suit is brought, this is not supported by the evidence when the only testimony as to any lurch is that of the plaintiff who swears "the engine gave an unusual jerk." (R., p. 21.) And particularly is this true where the injured party was not looking at the locomotive and the testimony of the engineer and fireman is to the effect that nothing was done to cause a jerk or lurch, and if there was such jerk or lurch it was due to slack. (R., pp. 62, 64, 67 and 68.)

3. In such a case where the evidence shows that such jerk may have been caused by slack running in or by the engineer, the negligence is not proven when the engineer shows that he did nothing to cause it. The possible inference that the engineer caused the jerk is destroyed. Southern Ry. Co. *v.* Dickson, 211 Ala. 481; 100 So. 667.

4. Where the evidence for a plaintiff, in an action charging an engineer with a negligent jerk, is that his injury was caused by a jerk not unusual for men on the train but unusual for plaintiff on the ground and about to board the train, it is necessary to prove that the engineer knew, or had reason to believe, that

plaintiff was on the ground and about to board the train. Southern Railway Co. *v.* Dickson, 211 Ala. 481, 100 So. 667; Austin *v.* Mobile & Ohio Railroad Company, 134 Miss. 226; 19 So. 3; Davis *v.* Shirer, 288 Fed. 293.

5. In such case the knowledge that is material is that of the engineer, or, to say the least, of the engine crew, and not of the entire crew of the train. Refusal of instruction to that effect is error. Railway Co. *v.* Dickson, 211 Ala. 481, 100 So. 667; Austin *v.* Railroad Co., 134 Miss. 226, 99 So. 3; Davis *v.* Shirer, 288 Fed. 293.

6. It is error to refuse to instruct the jury to find for a defendant if the running in or out of the slack caused the injury, where it appears without dispute that slack is found in all trains of standard construction and the running in or out is a necessary incident to the operation of such train.

ARGUMENT.

The Court Erred in Refusing to Direct a Verdict for Petitioner.

At the close of respondent's case, the trial court on motion of petitioner excluded the evidence as to the first and third counts and instructed the jury as to these counts to find for petitioner. (R., pp. 41 and 42.) This left for consideration the second count. Petitioner offered its evidence as to this count alone. At the close of the whole case petitioner requested an instruction, as shown on page 14 of Record, in the following form:

> "The court instructs the jury to find for defendant."

This instruction was refused. (R., p. 14.) This action of the court is the basis of the first specification of error. The request for this instruction under Mississippi practice presents the question as to the sufficiency of the evidence to support the cause of action alleged. Swan v. Liverpool Ins. Co., 86 So. 460, 123 Miss. 826.

As shown above petitioner insisted, and now insists, that the evidence does not show any negligence on the part of petitioner. That this is essential in all suits based on, or brought under, the Federal Employers Liability Act is borne out by many cases from this court, including Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, and San Antonio Ry. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110.

The act of negligence alleged was "that the engineer gave a sudden and unnecesary lurch of the train." Petitioner respectfully submits that its contention that no negligence is shown finds ample support in two propositions, viz:

1. The declaration charges that the engineer caused the train to jerk unnecessarily and suddenly. This is not supported by the record.

2. The testimony of respondent was that the jerk was unusual only for men on the ground who were about to board the train. It is submitted that under such circumstances no negligence is shown unless it is made to appear that the engineer knew, or had reason to believe, that respondent was not on the train but was about to board it.

1.

No Evidence That Engineer Caused the Jerk.

Respondent swears that after he had given to the fireman a signal to go ahead the conductor told him to throw the derail on an adjoining track. The derail was about forty feet from the back end of the train. After throwing the derail respondent says:

> "I throwed this derail and cut straight across to get to the caboose—the train was running not over eight or ten miles per hour when I went to catch the caboose and this big lump of coal about as big as your fist was there and as I grabbed the grab iron I stepped on this piece of coal and I went down and the engine gave an unusual jerk and that threw me and my knee struck on the cross ties." (R., p. 21.)

The train consisted of eight, nine or ten cars. The caboose was the last car of the train. Respondent was on the left hand side of the train. He had signaled

the train to go ahead. (R., p. 29.) Respondent was experienced in boarding moving trains and knew that was one of his duties. (R., p. 30.) The train had moved about fifty feet between respondent's signal to go ahead and his attempt to board. (R., p. 29.)

Respondent swears that as he reached to catch the train he had his eyes and mind on getting on that train and in watching the way he was going. (R., p. 36.)

This places respondent by his own evidence from eight to ten cars away from the locomotive. He was approaching it, as is evident, at a right angle and with his eye on what he was doing. The track was perfectly straight. (R., p. 39.) Had the jerk occurred as respondent approached the train he could not have observed the locomotive because he was not looking at it. Surely he could not say the locomotive caused the jerk when the jerk occurred after he had stumbled while at the very side of the train with the locomotive on a straight track ten cars away

Respondent swears, too, that slack running in does to a certain extent cause the train to jerk and lurch. (R., p. 37.)

This is in substance the testimony of respondent in support of the charge that the engineer gave a sudden and unnecessary jerk of the train. The most that can be said is that there is from respondent's statement an uncertain inference that the engineer caused the jerk. He could not know that the engine did it.

All of the crew in a position to know say that the engineer did nothing to cause a lurch or jerk. Alexander, the engineer, swears that he "started off in the ordinary way,—open throttle" and did nothing to

cause a sudden or unusual lurch. (R., p. 62.) And on cross examination when asked what causes the train to lurch said that "slack" caused it. And further he swears that the engineer can not make a train lurch when the slack is all out or when the train is in motion. (R., p. 63.)

Blalock, the fireman, swears that nothing was done on the locomotive to cause it to lurch or jerk. (R., p. 64.) And he swears that "slack" alone causes a lurch in a moving train. (R., p. 65.)

Ezell, the head brakeman, was on the locomotive with the engineer and fireman. He says nothing was done on the locomotive to cause the jerk or lurch. (R., p. 68.)

The flagman who was on the caboose does not remember that there was any lurch. (R., p. 69.) In fact the flagman was sweeping out the caboose and he was not thrown. The conductor who was on the caboose felt no unusual, or even usual, jerk. (R., p. 49.)

As to "slack" the conductor swears as follows, putting his testimony as shown on pages 49 and 50 of the Record in narrative form:

> "The lurch and jerk about any freight train is caused by the slack running in and out. The lurch or jerk when a train starts is due to slack. The drawhead is the coupling. All the drawheads have springs and slack will run in and when you pull out it will straighten out. On each end of a car is a coupling. The spring is behind the drawhead and under the car. When the cars are bunched the springs press together. When the train starts out it naturally stretches out; pulling the drawheads away will pull the slack out. There is

> no way to prevent this. The train was properly equipped with brakes, and couplings and drawheads and according to the standard and best known methods in reference to drawheads."

This is the state of the case. The respondent did not attempt to deny the facts testified to by the train crew as to the effect of slack and as to the inability of the engineer to cause a jerk or lurch while the train was in motion. There is no contradiction or impeachment of their testimony.

Petitioner respectfully submits that this evidence utterly fails to show negligence on the part of the engineer or any other member of the crew.

Concede for the argument that there was a jerk. Still the record shows without dispute that the engineer did not cause it. All witnesses agree that "slack" could have caused it. All agree that "slack" is in all trains of standard construction. The jerk, if any, must have been caused by the "slack."

To say the most for respondent's case, two causes of the jerk appear. One was, to use respondent's language, "the engine gave an unusual jerk." The other was the operation of slack in the train. But respondent's statement that the engine gave an unusual jerk does not prove that the engineer caused it. This might have happened without any act of the engineer. Slack running in would necessarily affect the locomotive. So the jerk was due to one of two causes. As to which, the evidence of respondent says little. But the evidence is undisputed that the engineer could not have caused it. The Supreme Court of Alabama in the case of Southern Railway Co. vs. Dickson, 211 Ala. 481, 100

So. 667, a case based upon the Federal Employers' Liability Act, said:

> "Counsel's insistence is that, conceding the fact of the jerk or jar, the evidence shows that it might have been the result of any one of four distinct agencies: (1) The jamming of the air; (2) the sticking of the brakes; (3) the rolling up of the slack (there being 49 cars) or (4) the act of the engineer, and that, as to any causative action by the engineer, the affirmative conclusion required could not be grounded on anything more than conjecture. As this court has often declared, findings of fact based on conjecture merely cannot be upheld. As said in Southworth, Adm'x *vs.* Shay:
>
> > "'Proof which goes no further than to show an injury could have occurred in an alleged way does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.'
>
> "But a nice discrimination must be exercised in the application of this principle. As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a judicial basis for such a determination, notwithstanding the existence of other plausible evidence."

In the instant case the jerk may have been due to (1) the rolling up of the slack or (2) the act of the engineer. No other cause is hinted at. Respondent's

testimony is that the "engine gave an unusual jerk." He does not say the engineer caused it to give this unusual jerk. His testimony does not select a cause. Petitioner's evidence shows clearly that the engineer did not cause it and could not cause it. It shows that "slack" could cause it.

Petitioner respectfully submits, therefore, that the evidence does not establish that the engineer caused the jerk and, since this was the negligence alleged, the peremptory instruction should have been granted.

2.

Conceding for the Argument that Engineer Caused Jerk, Still No Negligence is Shown.

Respondent swears that the jerk was unusual. He does not say that it was violent or that it was unnecessary. The statement that it was an unusual jerk was necessarily relative. On being pressed to give an idea as to how unusual the jerk was, respondent said:

> "Q. You did not say on the former trial that the lurch you said the train gave or the jerk was not such a jerk as is frequently had on trains when the men are on the ground—did you say that or not?
>
> A. I don't remember. I remember telling you if the engineer had reversed his air brakes in control the slack was in the train would roll itself.
>
> Q. Did you say it was the usual jerk for men who were on board?
>
> A. I said it was the usual jerk.
>
> Q. Did you on the other trial?
>
> A. Yes.

Q. What you said on the other trial was true,
A. As far as I understand." (R., p. 39.)

The jerk, therefore, was the usual jerk for men on board but unusual for men on the ground about to board. All consideration is omitted of the fact that the flagman while sweeping out the caboose was not thrown by the jerk.

Petitioner submits, conceding for argument's sake that the engineer caused the jerk, that if the jerk was "unusual" only for a man about to board the train, that the engineer was not negligent unless he knew, or had reason to believe, that respondent was on the ground. In other words, the jerk was not in itself negligent. It was negligent only as to a person in a particular situation.

The Supreme Court of Alabama in the case of Southern Railway Co. *vs.* Dickson, *supra*, was confronted with a case of a violent, unusual and extraordinary jerk. It here said:

> "Our cases very clearly support the proposition that, when the act which caused the injury is specified, and is not negligent in itself, but only when the actor was chargeable with knowledge that some one was in a position of peril with respect to consequences, no breach of duty is shown without an allegation that the actor had such knowledge or was so chargeable."

And the Supreme Court of Mississippi in the case of Austin *v.* Mobile and Ohio Railway Company, 134 Miss. 226, 99 So. 3, said:

> "Engineer on engine pushing six flat cars, who without signal applied emergency brakes, and brought the train to a sudden stop on signal from

conductor, when a cow made an effort to cross in front of the train, and who thereby caused a switchman riding on the front end of the front car to be precipitated over the end of the car held not negligent in the absence of evidence that he knew that the switchman was in a position of peril, or that he should or could have given a signal."

And the Circuit Court of Appeals for the Fourth Circuit in the case of Davis *vs.* Shirer, 288 Fed. 293, dealt with a case in principle similar to the case at bar. That court said:

"There remains the allegation that there was negligence in so managing the train as to cause the unusual jar. To whatever degree it was out of the common, it does not appear to have been sufficiently great to injure any of the passengers in the car. Several of the witnesses who have testified apparently were on their feet at the time it occurred, and only one complained of having lost his balance in consequence. Had the engineer any reason to anticipate that the deceased would be trying to get upon one of the cars at the time, and was he in consequence bound so to operate his train as to avoid the risk of jarring it at the moment that the decedent might be trying to get on it? It would seem that the engineer had the right to assume that the decedent was where the rule and the safety of everybody on his train required him to be, and that was somewhere not less than half a mile in the rear of his train or on his way to that point. It has been argued that the defendant may not rely upon the violation by the deceased of this rule, because it was said it was not pleaded, and, even if it has been, this defense goes only to question of contributory negligence which does not bar the recovery. Neither contention is sound. Before any question of contributory negligence can become important, and before

the defendant is called upon to make or allege any affirmative defense, the plaintiff must show that he was negligent in some manner of which the deceased had the right to complain. This, in our view, she has failed to do.

"Railroading is a dangerous occupation. A certain number of accidents will happen without the companies having fallen short of the highest care reasonably practicable."

Did the engineer know, or have reason to believe, that respondent was on the ground and about to board the train? The undisputed facts on this feature are these:

Respondent was on the fireman's side. He signaled the fireman that he was ready to go. (R., p. 29.) The fireman says he "highballed" Mr. Wells and he highballed him back. The fireman then left his seat, got down on the deck of the locomotive, and began firing. (R., p. 64.) The engineer swears that he did not know where Wells was when he pulled out. (R., p. 62.)

Respondent, standing as he was, by the caboose, gave the signal to move. The alleged jerk was given after the train had moved forward 50 feet. Clearly the engineer did not know respondent was not on board. And there can certainly be no basis for charging that he had reason to know that he was about to board. Respondent's signal was to the fireman the assurance that he was ready to go.

The Alabama court in the case of Railway Co. *v.* Dickson, *supra*, thus announces the essentials of liability in a case of jerks and jars as in the case at bar:

> "In order to recover in this case it was necessary for plaintiff to show: (1) That he was thrown from his position on top of the car by a jerk or jar; (2) that this jerk or jar was sudden, extraordinary, and of unusual violence; (3) that it was caused by the engineer in the operation of the train; (4) that it was not a necessary incident of such operation, and (5) that at the time of its causation the engineer knew, or had reasonable grounds for believing, that the plaintiff then occupied such a position on one of the cars that such movement would probably imperil his safety."

Applying these principles to the case in hand we have:

(1) The evidence shows that respondent was jerked off. At least it was a question of fact. (2) The jerk was not characterized as "sudden or extraordinary" nor was it characterized as of "unusual violence." It was characterized as an unusual jerk. (3) The engineer swears positively that he did not cause the jerk. No one says he did. (4) The jerk, according to the evidence, was due to "slack" which is an incident to train operation and present in all such operations. (5) The engineer did not cause it. Even had he, the engineer did not know, nor had he reasonable grounds for believing that respondent was in a position that such a movement would imperil his life or limb.

Petitioner respectfully submits that under the facts no negligence was shown and certainly the negligence charged was not proven. And the trial court erred in refusing to direct a verdict for petitioner and the Supreme Court of Mississippi erred in affirming that action of the court.

Refusal of Instruction that if Crew of Engine Did Not Know Respondent was Not Aboard to Find for Petitioner.

Petitioner requested of the trial court the following instruction which was refused:

> "The court instructs the jury for the defendant that if you believe from the evidence that the crew of the engine did not know that the plaintiff was not aboard the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train." (R., p. 14.)

In lieu thereof the court granted the following instruction:

> "The court instructs the jury for the defendant that if you believe from the evidence that the crew of the train did not know that the plaintiff was not aboard the train, and was guilty of no negligence in not knowing, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train." (R., p. 12.)

It might be well to state here that under the law of Mississippi the trial court may not instruct the jury except through written instructions prepared and presented to the court for the purpose of being granted or refused, Mississippi Code of 1906, Sec. 793, Hemingway's Code, Sec. 577. It is reversible error for the court to instruct the jury orally even on the inquiry of the jury. Gilbert *v.* State, 78 Miss. 300, 29 So. 477. The trial court may not originate an instruction but is confined to the written requests of the parties. Canter-

berry *v.* State, 90 Miss. 279, 43 So. 678. As far as the trial court may go in presenting to the jury his idea of the law is through the requested instructions or by a modification thereof. And the court is under no duty to modify. And the modification must be in writing. Johnson *v.* State, 78 Miss. 627, 29 So. 515.

So the instructions shown to have been given for respondent on pages 10 and 11 of the Record reflect all instructions given for respondent. The instructions shown on pages 12 and 13 reflect all the law given to the jury for petitioner. And the refused instructions shown on pages 13 and 14 of the Record show all requests that were refused.

As will be observed the court refused to instruct the jury that if the crew of the engine did not know that plaintiff was not aboard the train that it should find for petitioner even though it may have believed that an unusual lurch was given the train.

This is but a statement of the law which petitioner says entitled it to a directed verdict. The evidence in detail has been pointed out.

Respondent says the lurch was "unusual" but only for men not on board the train who were about to get on it. Assuming that the engineer caused the lurch, it is not disputed that respondent set the train in motion or had a hand in it. And he did this while close to the train. The jerk was negligent only when it is made to appear that knowledge of the position of peril of respondent was with the engineer. Railway Co. *v.* Dickson, *supra*, Austin *v.* Railroad Company, *supra*.

The knowledge of the engineer or those on the locomotive is essential. The engineer was the negligent actor, if the pleadings are consulted.

But the court declines this instruction. It does, however, concede that under the facts of this case knowledge of the perilous position is necessary. This is clearly shown for the court did instruct the jury that if "the crew of the train did not know that plaintiff was not aboard the train, and was guilty of no negligence in not knowing" then the jury should find for petitioner even though there may have been an unusual lurch.

Petitioner submits that it is not the knowledge of the entire crew that is material but the knowledge of the engineer or to say the least of those in the locomotive, the engineer and fireman.

This departure in the instruction was hurtful because the conductor admits he sent respondent to throw the derail. (R., p. 52.) But the court did not stop with the qualification that the train crew must know. It added the qualifying clause "and was guilty of no negligence in not knowing." There is nothing in the record to support this qualification. The conductor says that it was the duty of each man to look out for himself. (R., p. 52.) And respondent on being asked who gave the signal for the train to go ahead said: "I did." (R., p. 29.)

Petitioner respectfully submits that the refusal to give the instruction as requested was error.

Refusal to Charge Jury that if Slack Caused Lurch to Find for Petitioner.

Petitioner requested the trial court to instruct the jury that if the lurch was unusual and was occasioned by the slack of the cars running in or out, it was the duty of the jury to find for the petitioner. (R., p. 14.)

There is no dispute that slack is in all trains of standard construction in good condition. The running in and out of the slack is an incident to the operation of the train. And it causes jerks and lurches. There is no dispute on the record as to this. (R., pp. 37, 49, 50.) Clearly a thing naturally incident to the operation of a train of standard construction is not negligence.

Petitioner respectfully submits that for the foregoing reasons this cause should be reversed.

Respectfully submitted,

ELLIS B. COOPER,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

GULF, MOBILE AND NORTHERN RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS, RESPONDENT.

REPLY TO RESPONDENT'S BRIEF.

Respondent's Statement of Facts Incomplete.

The brief for respondent assumes to give in detail the facts and in particular the testimony of respondent as to the severity of the lurch. For the most part the quotations of the evidence are drawn from pages 19, 21 and 37 of the record.

This testimony was clearly modified by respondent in a later phase of his examination. (R., p. 39.) This has been set out in petitioner's original brief. Respondent there says that the lurch was unusual only for those about to board the train.

The lower Court clearly accepted this view of respondent's testimony. It is reflected in the instruction granted petitioner at the close of page 12 of the record.

The degree of the lurch was further clearly illustrated by the undisputed fact that the flagman was standing up in the caboose, the car respondent was attempting to board, and was sweeping out the car. He felt no unusual movement and was not thrown. (R., p. 69.)

In the argument here as to the correctness of the action of the trial Court in refusing to direct a verdict for petitioner, these facts are omitted from respondent's consideration. The entire argument is based upon the assumption that the lurch was negligent under all conditions. And this assumption is contrary to respondent's own testimony and that of all other witnesses.

Respondent's Statement in Brief That Fireman Knew Incorrect.

And respondent in his brief says the following:

> "Respondent also testified that this lurch or jerk of the train was given at a time when the fireman, who was sitting instead of the engineer on his, respondent's, side of the train, taking signals from respondent, and when he knew, or could have known respondent was about to board the train." (Page 7 of respondent's brief.)

This is a statement made to bring this case within the rule of the Behmyer case, 189 U. S. 486, 32 Sup. Ct. Rep. 622.

There is absolutely no basis for this statement to be found in the record. Respondent does not say it. He does not attempt to say it. Respondent signalled the train ahead. He was on the left side, the fireman's side. (R., p. 28.) The fireman, to put the pertinent part of his testimony in narrative form, said:

"I highballed Mr. Wells and he highballed me back. Highball means we are leaving the station. After he highballed me back I got down in the deck and went to firing." (R., p. 64.)

On cross-examination the fireman says:

"Q. And you knew where he was at the time?

A. That is when I got the highball.

Q. You don't know whether he was ordered to do anything after that time by the conductor, do you?

A. No, sir.

Q. You don't know what became of him after you saw the highball?

A. Became of Mr. Wells.

Q. Yes.

A. No sir.

Q. You didn't see him any more—you went on to shoveling in coal?

A. Sure—I didn't see him anymore." (R., p. 66.)

This excerpt clearly shows that the fireman did not known that the respondent was not on board the train. Respondent gave this fireman the signal that he and his part of the train were ready to go. The facts are entirely contrary to the statement in respondent's brief. The fireman did not know that respondent was not on board. On the contrary, he had been assured by respondent that everything was all right.

Behmyer Case Supports Petitioner.

Reliance is placed by respondent on the case of Texas Pacific Railway Company *v.* Behmyer, 189 U. S. 468, 47

L. Ed. 905, 32 Sup. Ct. 622. An analysis of this case clearly shows that it does not militate in any way against the position petitioner has taken here. On the contrary, it tends to support petitioner's position. This Court there says:

> "Behmyer based his claim upon negligence in stopping the cars so suddenly *with knowledge of his position* and the slippery condition of the roof of the car, and upon the projection of the nail, which increased the danger and contributed to his fall."

There the declaration charged a knowledge of the dangerous condition of the roof and the perilous position of the employee. No knowledge is brought home, nor is it charged, to those on the locomotive in this case.

In the Behmyer case, while the fellow employees knew of the condition of the car and position of the injured man, the cars were moved up a hill and suddenly stopped. The slack ran in and then back again. This Court there recognizes that the running in and out of slack is an incident to the operation of trains. This Court then says:

> "No doubt a certain amount of bumping and jerking is to be expected on freight trains, *and under ordinary circumstances cannot be complained of.* Yet, it can be avoided if necessary, *and when the particular and known condition* of the train makes a sudden bump, *obviously dangerous* to those *known to be on top of the cars*, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty."

This is the identical principle established in the cases cited for petitioner in its original brief, viz: Southern Railway Co. v. Dickson, 211 Ala. 481, 100 So. 667; Austin v. Railway Co., 134 Miss., 226, 99 So. 3; Davis vs. Shirer, 288 Fed. 293.

In the Behmyer case a sudden stop was conceded. There were known conditions of danger. In the case at bar respondent alone says there was a lurch. And there is no dispute over the entire absence of knowledge on the part of those in the locomotive of any position of danger of respondent.

The Behmyer case concedes a very sudden stop due to the act of the engineer. Here the engineer, the fireman and the brakeman swear, and there is no dispute as to this, that nothing was done on the locomotive to cause a lurch or jerk. And it is further shown that if there was any lurch it must have been due to slack.

Fact That Respondent Fell No Evidence of Severe Lurch.

It is next urged that the fact that respondent fell is evidence that the lurch was unusual. An Alabama case is cited to this effect.

Respondent loses sight of the fact that this same lurch did not cause the flagman to lose his balance although he was standing and engaged in sweeping out the car which respondent was boarding. (R., p. 69.) The Circuit Court of Appeals for the Fourth Circuit in Davis *v.* Shirer, 288 Fed. 293, considered facts of this nature to be very pertinent.

Respondent did not consider the lurch severe until the trial. Two weeks after the accident he was given Form 31 to fill out. He took this home, answered the questions and mailed it in to petitioner. (R., pp. 36 and 37.) One of the questions related to the cause of the accident. The question and answer read:

> "A. Q. State in a succinct way the cause of the accident? A. Stepped on a piece of coal, gave down

and missed my foot step—was thrown back and knee striking cross ties." (R., p. 37.)

Respondent Admits That Testimony as to Cause of Lurch Mere Opinion.

Respondent urges that his testimony "that the engine gave a sudden lurch" was sufficient to go to the jury on the question of whether the engineer caused the lurch. In the same paragraph in the brief he says:

> "* * * and he was an experienced brakeman, just as much so as the other members of the crew in charge of the train, *and even though it might be said that he did not see the engineer cause the lurch*, he had the same right to state, *from his opinion*, what caused the lurch, as did the other members of the crew, and then it was a question for the jury to decide, and to which they had a right to apply their common every day experience as men, and to judge from all the facts, the surrounding circumstances, and from their experience as men, what caused the lurch or jerk." (Respondent's Brief, p. 9.)

Respondent here admits that any testimony of his that the engineer caused the lurch was *an opinion* and nothing else. "But," says respondent, "an opinion of mine is as good as the opinion of the others."

Petitioner has offered no opinions. The engineer says he did not do a thing to cause the lurch. (R., p. 62.) The fireman says the engineer did nothing. (R., p. 64.) The head brakeman, then on the engine, swears that nothing was done. (R., p. 68.)

These are facts and not opinions. Respondent charges that the "engineer on said train gave a very sudden and

very unnecessary jerk of said train." (R., p. 3.) It was incumbent upon him to prove it. He does not do so.

This Court in the case of Patton *vs.* Texas & Pacific R. Co., 179 U. S. 658, 45 L. Ed. 361, has this to say:

> "The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & P. R. Co. *v.* Barrett, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

Respondent has not adduced the evidence. According to his own admission he ventures only an opinion that the engineer caused the lurch. The facts show that slack may have caused the lurch. No negligence is proven.

Negligence Charged is That of Engineer and Not Train Crew.

It is urged that the Court was correct in refusing the instruction that if the crew of the engine did not know

that respondent was not on board, it was the jury's duty to find for petitioner. (R., p. 14.)

The negligence charged is that of the engineer. He is charged with having suddenly jerked the train. The courts hold that knowledge of the perilous condition is necessary to make the act actionable negligence.

Respondent says that for men on board the lurch was usual. But for men about to board it was unusual.

Respondent says he gave the signal to leave the station. He says he gave it to the fireman. He says that this indicated he was ready to go. The train moved out and moved fifty feet. No one on the engine knew of the fact that respondent was not on board. They had every reason to believe that he was. Respondent was standing by the last car of the train, the caboose. He was either aboard at the time of the alleged lurch or he was left.

The evidence shows without dispute that the engine crew did not know of respondent's position and certainly they had every reason to believe that respondent was aboard.

The court recognizes this but says the knowledge should be that of the entire train crew and not of the engine alone. Yet the engineer is the only one charged with negligence. And he alone operated the engine.

That there is nothing in respondent's brief to show that petitioner's position on the errors assigned is wrong is respectfully submitted.

Respectfully submitted,

W. S. WELCH,
ELLIS B. COOPER,
Attorneys for Petitioner.

FILED
JAN 17 1927
WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. [redacted] 39

[redacted], Petitioner

vs.

W. F. WELLS, Respondent

BRIEF FOR RESPONDENT

W. CALVIN WELLS
Counsel for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

NO. 328

GULF, MOBILE & NORTHERN RAILROAD COMPANY, Petitioner

Vs.

W. F. WELLS, Respondent

BRIEF FOR RESPONDENT

STATEMENT OF CASE

W. F. Wells, respondent, brought this suit in the Circuit Court of Jones County, Mississippi, against the Gulf, Mobile and Northern Railroad Company, petitioner, for personal injuries, in which court there was a verdict and judgment for respondent and the case was appealed to the Supreme Court of the State of Mississippi, where judgment was affirmed.

The declaration is in three counts, only one of which is necessary to notice on this appeal, and that is the second count of the declaration. In this second count, respondent based his right to recover upon the following allegations of negligence:

> "That plaintiff, while engaged as a brakeman for said defendant on the said train, and while doing and performing the duties of the said brakeman in the town of Stratton, an incorporated town in the State of Mississippi about 100 or 200 feet of the depot at Stratton on the line of the Gulf, Mobile and Northern Railroad Company, the plaintiff undertook to get on the said freight train, at a time when the train was moving, as it was his duty to do, and as he caught hold of the hand-iron on siad train, he stumbled on a piece of coal which was negligently left on the yard and just at the time he stumbled, the engineer on said train gave a very sudden and very unnecessary jerk of said train and carelessly and negligently jerked him from said train and caused him to fall on the ground, causing him to suffer very serious and permanent injury, which is more fully set out herein."

To this allegation and declaration petitioner filed a plea of the general issue.

The facts developed on the trial of the case show that the respondent was engaged in the performance of his duty as a brakeman on a freight train of the petitioner; that on the occasion of the injury complained of, the crew in charge of petitioner's train had just completed some switching on the yards of petitioner in the town of Stratton, and that the train was made up and ready to go. That the train in question was headed south on the main line tracks of petitioner. The engineer on said train was in the cab on the west side of the engine, the fireman was in the cab on the

east side of the engine, the conductor and flagman were in the caboose at the rear of the train and respondent was on the east side of the train near the caboose. It was a light train with very few cars attached thereto. Respondent "high-balled" the fireman, who was taking signals for the engineer, that he was ready to go. Just after the "high-ball" signal was given, the conductor, **who was in charge of the train,** whose orders it was respondent's duty to obey, ordered respondent to throw a derail switch about 50 feet away from the caboose. Respondent threw this switch after the train had been set in motion, and then ran back to catch the moving train. Just as respondent took hold of the grab-iron on the east side of one of the cars in said train, he stepped upon a lump of coal, his foot turned, and at the same time, the engine of said train gave a very unusual jerk or lurch.

"Q. Tell the jury just how you were injured?

A. As I grabbed the grab-iron I stepped on this piece of coal and I went down and the engine gave an unusual jerk and threw me and my knee struck on the crossties." (R., p. 21).

A jerk or lurch such as he had never before experienced before on a train.

"Q. When you were on a train you have had such a severe jerk as you had there?

A. No.

Q. You never had that?

A. No.

Q. This was a jerk such as you never experienced before on a train——that right?

A. Yes." (R., p. 37).

(and he was an experienced brakeman)

"Q. Have you ever been employed by the G. M. & N. R. R.?

A. Yes.

Q. In what capacity?

A. Brakeman.

Q. When employed by them?

A. In April, May, part of June and July, 1924.

Q. When you went to work in what capacity did you work?

A. My job?

Q. Yes?

A. As brakeman.

Q. Worked all the time as a brakeman?

A. Yes." (R., p. 19).

A very unnecessary lurch on a light train, such as the train in question.

"Q. You say the run in of the slack gave a lurch—dose not the engine sometimes give a lurch to a train?

A. Yes.

Q. And if a light train be more liable to give a lurch than a heavy train?

A. Would not give the lurch——would not be necessary." (R., p. 55).

This lurch or jerk jerked respondent loose from the train and thereby caused him to fall on the end of the crossties, which caused the injury complained of. This jerk, or lurch of the train was given at a time when the fireman who was sitting in the engineer's stead, and taking signals from the respondent, knew, or by the exercise of reasonable care could have known, the position of respondent.

"Q. Which side of the train was that on?

A. Left hand side facing South.

Q. Which side of the train did the conductor work on?

A. On the same side.
Q. The engineer—I mean.
A. Right hand side.
Q. When he is on the right hand side who is it gives him orders on the left side?
A. Fireman—taking signals.
Q. Was the fireman on the left side?
A. Yes.
Q. Was he in a position to see where you were?
A. Yes.
Q. And could see where you were?
A. Yes." (R., p. 24).

The case was submitted to the jury upon the issue of whether or not the respondent's injuries were proximately caused by a sudden or unusual jerk of the train, at a time when he was attempting to board it. These issues were sharply drawn by the pleadings and by the evidence, and the instructions fairly presented the law, and most abunbantly presented the law for the petitioner, as will be shown by the record. (R., p. 11, 12, 13).

There was a verdict and judgment for the respondent, and the case was appealed to the Supreme Court of the State of Mississippi, which court affirmed the judgment, and petitioner brings the case here on writ of certerori.

BRIEF OF ARGUMENT

Counsel for petitioner in his brief to this court assigns only three grounds of error in the court below, namely:

First:

That the court erred in refusing to instruct the jury at the close of the whole case, to find for the defendent.

Second:

That there was error in refusing to grant petitioner the following instruction:

> "The court instructs the jury for the defendant, that if you believe from the evidence, that the crew of the engine did not know that the plaintiff was not aboard the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train."

Third:

"That the court erred in refusing to grant petitioner the following instruction:

> "The court instructs the jury that even though you may believe from the evidence that there was an unusual lurch, still if said lurch was occasioned by the slack between cars running in or out, it is your sworn duty to find for defendant."

We will attempt to answer the alleged errors complained of in the order named.

ARGUMENT

I.

DID THE COURT ERR IN REFUSING TO DIRECT A VERDICT FOR PETITIONER?

In deciding this question, this court will take the most favorable statement of plaintiff's case to be true, and if, when looked at from its most favorable light, there is evidence sufficient to show negligence, proximately causing respondent's injuries, this court will not disturb the judgment.

Texas and Pacific Railway Company vs. Abe Behymer, 189 U.S. 486 32 Sup. Ct. Rep.622, Great Northern Rail-

road Company vs. O. B. Knapp, 240 U. S. 464, 466; 69 L ed., 745, 751, 36 Sup. Ct. Rep. 399, Seaboard Air Line Company vs. Padgett, 236 U. S. 688, 673; 59 L ed. 777, 781, 35 Sup. Ct. Rep. 481; Seaboard Air Line Company vs. Koennecke, 296 U. S. 352, 355 L ed., 36 Sup. Ct. Rep. 126, Walters Pierce Oil Company vs. State of Texas, 212 U. S. 86, 29 Sup. Ct. Rep. Great Northern Railroad Company vs. Donaldson, 246 U. S. 121, 38 Sup. Ct. Rep. 230.

The respondent testified that at the time of the injury he attempeted to catch the moving train and that just as he took hold of the grab-irons on the side of the box car, that the engine gave an unusual jerk, (R., p. 21.); a jerk such as he had never experienced before on a train, (R., p. 37), and that he was an experienced brakeman, (R., p. 19); that this jerk or lurch of the train jerked him entirely loose from the train and that his injuries were caused thereby.

Petitioner's conductor, one of petitioner's witnesses on the trial of the case in the court below, testified that such a lurch was unnecessary in handling a train like the one in question, (R., p. 55). Respondent also testified that this lurch or jerk of the train was given at a time when the fireman, who was sitting instead of the engineer on his, respondent's, side of the train, taking signals from respondent, and when he knew, or could have known respondent was about to board the train.

Can this court say, as a matter of law, that such a statement of facts are not sufficient to show negligence? We do not think so. This court, in the case of Texas Pacific Railway Company vs. Abe Bahkmer, supra, a case, the facts of which are similar to the facts in this case, had this to say:

> "No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet, it can be avoided, if necessary, and when the particular and known condition of the

> train makes a sudden bump, obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty."

It has been the rule of this court that questions as to whether or not jerking and lurching of freight trains was negligence on the part of those in charge of the operation of such trains, under certain circumstances were questions to be decided by the jury, and not questions of law to be decided by the court, but we submit that, taking the most favorable statement of this case for respondent, as the record discloses, that the court would be warranted in saying as a matter of law, that such handling of a train, under such circumstances, constituted negligence on the part of those in charge of the operation of the train.

In the case of Birmingham, etc., Company, vs. Wilmer, 97 Alabama, 165, 11 Sou. 886, where the court had under consideration the question of a lurch or jerk of a train whereby a man was injured, the court had this to say:

> "Moreover, it is not disputed that plaintiff was knocked over by, or fell off the train in consequence of this jerk. This was, of itself, some evidence for the jury that the jerk was unusual, and negligently severe."

In the case at bar, it was not disputed that respondent was jerked from the train by the sudden lurch. Applying the same principle of law, this was, of itself, some evidence for the jury that the jerk was unusual and negligently severe.

Counsel for petitioner takes up a great deal of his time in arguing conflictions in the testimony, and quotes the parts of the record most favorable to his cause, but we submit that when the most favorable statement of the case for respondent, disclosed by the record, is taken, that there

was sufficient proof of negligence to warrant the finding in favor of respondent.

It is urged by counsel for petitioner, that the evidence is not sufficient to show that the engineer caused the lurch, but in this contention, he quotes only from his own witnesses. Respondent says, (R., p. 21.) that the engine gave a sudden lurch, and he was an experienced brakeman, just as much so as the other members of the crew in charge of said train, and even though it might be said that he did not see the engineer cause the lurch, he had the same right to state, from his opinion, what caused the lurch, as did the other members of the crew, and then it was a question for the jury to decide, and to which they had a right to apply their common, every-day experience as men, and to judge from all the facts, the surrounding circumstances, and from their experiences as men, what caused the lurch or jerk.

We are aware that the members of this court are human beings, and that they have had some experience in riding trains and observing the operation of trains, and they will know that the contention that an engineer in charge of the operation of a train cannot cause a jerk or lurch of a train, is too frivilous to deserve serious consideration.

Again counsel for petitioner states, on page 14 of his brief, that:

> "Respondent swears that the jerk was unusual. He does not say that it was violent or that it was unnecessary."

but in this, we insist that counsel is in error.

On page 37 of the record, respondent swears that this jerk or lurch was such a jerk or lurch as he had never experienced before on a train, and petitioner's witness, the conductor in charge of the said train, testified that such a jerk or lurch was unnecesasry, (R., p. 55). So we submit that there was sufficient evidence to show negligence, when

taken in its most favorable light for the respondent, that the evidence was conflicting, and under this state of the case, this court will not disturb the judgment.

II

DID THE COURT ERR IN REFUSING TO GRANT PETITIONER'S INSTRUCTION THAT IF THE CREW OF THE ENGINE DID NOT KNOW RESPONDENT WAS NOT ABOARD THE TRAIN, TO FIND FOR PETITIONER?

We insist that this instruction did not state the law applicable to the facts in the case. Actual knowledge on the part of the crew of the engine was not necessary for them to be negligent in the operation of the train, but if, by the exercise of reasonable care, they could have known of this, respondent's position at the time of the injury, then they would be guilty of negligence in doing the act, the result of which, respondent was injured.

The Supreme Court of Alabama, in the case of Southern Railway Company vs. Dickson, 211 Alabama, 481; 10 So. 665, says:

> "Upon a review of our cases dealing with liability of Railway Companies for injuries caused by jars or jerks in the operation of their trains, we have recently said:"
>
> "These cases indicate that the sudden jars or jerks in the movement of trains may be held negligent only when they are violent enough to naturally and probably result in injury to someone on the train who is known to be, or to probably be in a position of peril from such a movement, and when they are unnecessary, under the circumstances of the particular case."

Further on, in the same opinion, the court says:

> "We cannot, however, for this cause, reverse

> the judgment for the reason that the admitted allegation was nevertheless made an issue on the trial and the jury was clearly and specifically instructed (Charges 20, 22 and 23) that plaintiff could not recover unless he showed that the engineer operating the train knew, or in the exercise of reasonable care ought to have known, that the plaintiff was in, or would probably be in a position of peril at the time the jerk or shock was caused, if it was caused."

In this opinion the true rule is stated. It was not incumbent upon respondent to show actual knowledge on the part of th ecrew of the train of his position of peril at the time of the lurch or jerk, but if they knew, or in the exercise of reasonable care could have known his position, then they would be liable. Hence, we submit that the instruction about which counsel for petitioner complains, does not properly state the law applicable to the facts.

The trial court granted petitioner an instruction accurately stating the rule applicable to the facts, which instruction reads as follows:

> "The court instructs the jury for the defendant, that if you believe from the evidence that the crew of the train did not know that the plaintiff was aboard the train, and was guilty of no negligence in not knowing, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train." (R., pp. 12 and 13).

III

DID THE COURT ERR IN REFUSING TO GRANT PETITIONER'S INSTRUCTION TO THE EFFECT THAT IF THE LURCH WAS OCCASIONED BY SLACK THE JURY MUST FIND FOR PETITIONER?

Counsel for petitioner complains of the refusal to grant his instruction to the effect that even though the jury may believe from the evidence that there was an unusual lurch, still if such lurch was occasioned by the slack between the cars running in or out, it was their sworn duty to find for the defendant. This instruction does not correctly state the law. The slack in the train running in or out, might have occasioned the injury, and yet might not have been the proximate cause of the injury, or the sole cause of the injury.

If petitioner's instruction had stated that if the jury believed that the slack running in or out was the sole cause or the proximate cause of the injury, this would probably have stated the correct rule of law, but it did not so state the rule.

Respondent, therefore, respectfully submits that petitioner's assignments of error are groundless, and that his petition should be dismissed and the judgment of the State Court affirmed.

Respectfully submitted,
W. CALVIN WELLS,
Attorney for Respondent.

(11)

SUPREME COURT OF THE UNITED STATES.

No. 39.—October Term, 1927.

Gulf, Mobile and Northern Railroad Company, Petitioner, *vs.* W. F. Wells. } On Writ of Certiorari to the Supreme Court of the State of Mississippi.

[January 3, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

This action was brought by Wells in a circuit court of Mississippi to recover damages for injuries suffered by him while employed as a brakeman on a freight train of the Railroad Company. The declaration alleged that these injuries were caused by the negligence of the engineer in giving a very sudden and unnecessary jerk to the train when it was moving and Wells was undertaking to get on it, which threw him on the ground. At the conclusion of the evidence the Railroad Company requested that the jury be instructed to find for the defendant. This was refused. The jury found for the plaintiff; and the judgment entered on the verdict was affirmed by the Supreme Court of the State, without opinion.

It is unquestioned that Wells was at the time employed in interstate commerce, and that the case is controlled by the Federal Employers Liability Act.[1] Hence, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient, in kind or amount, to warrant a finding that the negligence of the engineer was the cause of the injury, the judgment must be reversed. *Seaboard Air Line* v. *Padgett*, 236 U. S. 668, 673; *Chicago, M. & P. Railroad* v. *Coogan*, 271 U. S. 472, 474.

Wells, who had been employed as an extra brakeman for a few months, was on the day of the injury the rear brakeman on a local freight train containing ten cars. After stopping at a station where some switching was done, the train was coupled up on the

[1] 35 Stat. 65, c. 149.

main track, on a down grade, in readiness to proceed on its journey. The engineer, fireman and head brakeman were in the cab of the engine. The engineer was on the right side, and the fireman on the left, it being his duty to take signals from that side and pass them to the engineer. The conductor and flagman were in the caboose at the rear of the train, and Wells was standing on the left of the train, near the caboose. Wells gave a signal to the fireman for the train to go ahead; and the fireman then went down into the deck of the engine to shovel in coal. Just after this signal was given Wells was told by the conductor to throw a derail switch on the left of the main track, some fifty feet from the caboose. After doing this, finding that the train had already started, he ran back. When he reached the train it had gone about fifty feet and was moving from eight to ten miles an hour. The cars had then passed him and he started to get on the caboose. He testified that as he caught the grab iron he stepped on a big piece of coal, his foot turned and he "went down and the engine gave an unusual jerk" which threw him loose from the train, and he fell on the ground, his knee striking on the cross ties, breaking the kneecap and otherwise injuring him. He also testified, on cross examination, that while the running in of slack on freight trains jerks or lurches them to a certain extent, this was a severe jerk such as he had never experienced before on a train; and, finally, that although he had seen such jerks on through freight trains, he had never seen them in local freights. The plaintiff offered no other evidence as to the cause of the injury.

All the other members of the train crew were introduced as witnesses by the defendant. Their testimony was to the effect that it was not the duty of the engineer before starting to look out for the men who might be on the other side of the train, that being the duty of the fireman; that when the engineer pulled out he did not know where Wells was; that he started in the ordinary way, with open throttle, and did nothing in operating the engine that could cause a sudden or unusual lurch of the train; that after a freight train starts there are usually jerks or lurches caused by the running out of the slack between the cars; that after the slack runs out the engineer cannot give any jerk or lurch to the train even by suddenly putting on steam; and that at the time of the injury there was in fact no unusual jerk or lurch of the train. No rebuttal evidence was offered.

It is urged here in behalf of Wells that, despite this evidence, the question of the engineer's negligence was properly submitted to the jury because of an inference to be drawn from Wells' own statement that "the engine gave an unusual jerk" which was more severe than any he had ever experienced or seen on a local freight train. We cannot sustain this contention. In the first place, there was no evidence that the engineer knew or should have known that Wells was not on the train, but was attempting to get on it after it had started and was in a situation in which a jerk of the train would be dangerous to him. See *Texas & Pacific Railway* v. *Behymer*, 189 U. S. 468, 479. Aside from this, Wells' statement that the jerk was given by the engine, was, obviously, a mere conjecture, as he was then at the side of the caboose, ten car lengths away, where he could not see what occurred on the engine. And his opinion that the jerk was unusual and severe as compared with those which he had previously experienced on local freight trains, had no substantial weight; his situation on the ground by the side of the moving train, after his foot had turned on the piece of coal and he had gone "down," being plainly one in which he could not compare with any accuracy the jerk which he then felt with those he had experienced when riding on freight trains.

In short, we find that on the evidence and all the inferences which the jury might reasonably draw therefrom, taken most strongly against the Railway Company, the contention that the injury was caused by the negligence of the engineer is without any substantial support. In no aspect does the record do more than leave the matter in the realm of speculation and conjecture. That is not enough. *Patton* v. *Texas & Pacific Railway*, 179 U. S. 658, 663; *Chicago, M. & St. P. Railway* v. *Coogan, supra*, 478.

As the jury should have been instructed to find for the defendant, we have no occasion to consider other questions which have been argued in reference to the charge to the jury.

The judgment is reversed, and the cause remanded to the Supreme Court of Mississippi for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.